No. 92-344

In the Supreme Court of the United States

OCTOBER TERM, 1992

GENE MCNARY, COMMISSIONER, IMMIGRATION AND NATURALIZATION SERVICE, ET AL., PETITIONERS

v.

HAITIAN CENTERS COUNCIL, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONERS

KENNETH W. STARR
Solicitor General

STUART M. GERSON
Assistant Attorney General

MAUREEN E. MAHONEY
Deputy Solicitor General

PAUL T. CAPPUCCIO
Associate Deputy Attorney General

EDWIN S. KNEEDLER
Assistant to the Solicitor General

MICHAEL JAY SINGER
MALCOLM L. STEWART
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

EDWIN D. WILIAMSON
Legal Adviser

ALAN J. KRECZKO
Deputy Legal Adviser

MICHELLE KLEIN SOLOMON
Attorney

Department of State
Washington, D.C. 20520

QUESTION PRESENTED

Whether the court of appeals properly ordered the district court to enter a preliminary injunction barring implementation of Executive Order No. 12,807, which was issued by the President on May 24, 1992, to authorize repatriation directly to Haiti of Haitian migrants interdicted by the United States Coast Guard on the high seas.

PARTIES TO THE PROCEEDING

The petitioners are Lawrence Eagleburger, Acting Secretary of State (substituted as a party pursuant to Rule 35.3); William P. Barr, the Attorney General; Gene McNary, the Commissioner of the Immigration and Naturalization Service; Rear Admiral Robert Kramek and Admiral J. William Kime, United States Coast Guard; and the Commander of the United States Naval Base at Guantanamo Bay, Cuba.

The respondents are the Haitian Centers Council, Inc, the National Coalition for Haitian Refugees, Inc., the Immigration Law Clinic of the Jerome N. Frank Legal Services Organization of New Haven, Connecticut, and the following individual Haitian nationals: Dr. Frantz Guerrier, Pascal Henry, Lauriton Guneau, Medilieu Sorel St. Fleur, Dieu Renel, Milot Baptiste, Jean Doe, Roges Noel, A. Iris Vilnor, Mireille Berger, Yvrose Pierre and Mathieu Noel. The individual respondents brought the action on behalf of others similarly situated with respect to the interdiction program, including subclasses consisting of Haitian migrants who had been "screened in" or "screened out" or were awaiting screening; relatives of such individuals; and Haitian migrants who had retained one of the respondent organizations to represent them. Compl. ¶¶ 36-41 (J.A. 30-31).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases: Page

Cases—Continued: Page

Cases—Continued: Page

Cases—Continued: Page

Constitution, treaties, statutes, executive orders, regulations and rules:

Statutes, regulations, and rules—Continued: Page

Statutes, regulations and rules—Continued: Page

In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-344

GENE MCNARY, COMMISSIONER, IMMIGRATION AND NATURALIZATION SERVICE, ET AL., PETITIONERS

v.

HAITIAN CENTERS COUNCIL, INC., ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The court of appeals' opinions (Pet. App. 1a-72a, 73a-124a) are reported at 969 F.2d 1350 and 969 F.2d 1326. The district court's opinions (Pet. App. 125a-141a, 142a-163a, 164a-168a, 169a-170a) are not reported. The Eleventh Circuit's opinions in *Haitian Refugee Center* v. *Baker* (Pet. App. 171a-189a, 190a-252a) are reported at 949 F.2d 1109 and 953 F.2d 1498.

JURISDICTION

The judgment of the court of appeals was entered on July 29, 1992. The petition for a writ of certiorari was filed on August 24, 1992, and was granted on October 5, 1992. J.A. 415. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

TREATIES, STATUTES, EXECUTIVE ORDERS, REGULATIONS, AND RULES INVOLVED

The U.N. Convention Relating to the Status of Refugees; U.N. Protocol Relating to the Status of Refugees; 1981 Agreement Effected by Exchange of Notes, U.S.-Republic of Haiti; 5 U.S.C. 701-706; 8 U.S.C. 1101, 1105a, 1157-1158, 1182(f), 1185(a), 1225-1226, 1251-1253; Presidential Proclamation No. 4865; and Executive Orders Nos. 12,807 and 12,324 are reproduced at J.A. 329-412.

STATEMENT

1. This case arises out of the President's exercise of his constitutional and statutory authority to establish a program for interdicting would-be illegal migrants on the high seas. See 8 U.S.C. 1182(f), 1185(a); 14 U.S.C. 89. The interdiction program was instituted by a Proclamation issued by the President on September 29, 1981. Proc. No. 4865, 46 Fed. Reg. 48,107 (1981) (J.A. 375-376). The President found that uncontrolled illegal immigration by sea is a "serious national problem" and "detrimental to the interests of the United States." *Ibid.* Accordingly, "to protect the sovereignty of the United States," he proclaimed that "[t]he entry of undocumented aliens from the high seas is hereby suspended and shall be prevented by the interdiction of certain vessels carrying such aliens." *Ibid.*[1]

On the same day, the President also issued Executive Order No. 12,324, 46 Fed. Reg. 48,109 (1981) (J.A. 372-374), "to carry out the suspension [of entry] and interdiction" that had "concurrently been proclaimed." *Ibid.* The Order instructed the Coast Guard to intercept vessels suspected of transporting illegal migrants and to return all passengers without proper documentation to their country of

[1] Several days prior to the Proclamation, the United States had entered into an agreement with Haiti permitting U.S. officials to interdict and board Haitian flag vessels suspected of carrying illegal migrants. Agreement Effected by Exchange of Notes, U.S.-Republic of Haiti, Sept. 23, 1981, 33 U.S.T. 3559, T.I.A.S. No. 10,241 (J.A. 380-384).

origin, subject to a proviso that any "person who is a refugee" would not be repatriated without his consent. §§ 2(c)(1) and (3) (J.A. 374).

To implement the Executive Order, the Immigration and Naturalization Service (INS) conducted informal, non-adversarial "screening" interviews of interdictees on board Coast Guard cutters. Any interdictees who made a credible showing of political refugee status were tentatively "screened in" and brought to the United States, where they could file a formal application for political asylum under 8 U.S.C. 1158—and, in the process, attempt to establish that they were in fact "refugees" under 8 U.S.C. 1101(a)(42)(A). Interdictees unable to make such a threshold showing were "screened out" and returned immediately to Haiti. Pet. App. 75a-76a, 193a-197a.

The interdiction program has been effective in enforcing our immigration laws. Between 1981 and 1991, more than 25,000 would-be illegal migrants were interdicted. From October 1991 to May 1992, an additional 35,000 individuals were interdicted. Leahy Decl. ¶¶ 3, 4 and attachments (DX 152; J.A. 231-232, 235-238).[2] The program has also saved countless lives, as many of the boats could not have completed the long voyage to the United States.

2. a. The present crisis began with a military coup in Haiti on September 30, 1991, in which the democratically elected government of President Jean-Bertrand Aristide was overthrown. Although the United States temporarily halted repatriation of interdicted Haitian migrants following the coup, it resumed repatriations on November 18, 1991, when the immediate post-coup violence subsided. Pet. App. 76a, 144a, 197a.

On November 19, 1991, the Haitian Refugee Center and others filed a suit (*HRC* v. *Baker*) in the Southern District of Florida. Pet. App. 76a. They contended, *inter alia*,

[2] We have been informed by the Coast Guard that an additional 1634 Haitian migrants were interdicted from June through October of this year, including 731 in October alone.

that the repatriations violated 8 U.S.C. 1253(h), which provides that the Attorney General shall not deport or return an alien to a country if he determines that the alien's life or freedom would be threatened on account of political opinion. The district court immediately entered a temporary restraining order. DX 22. Because interdictions were continuing at a high rate and Coast Guard vessels were seriously overcrowded, U.S. officials decided to house interdictees temporarily at the U.S. Naval Base at Guantanamo Bay, Cuba. Cummings Decl. ¶ 11 (DX 119).

The district court in *HRC* subsequently certified a plaintiff class described below as (Pet. App. 7a):

> all Haitian aliens who are currently detained or who will in the future be detained on U.S. Coast Guard cutters or at Guantanamo Naval [B]ase who were interdicted on the high seas pursuant to the United States Interdiction Program and who are being denied First Amendment and procedural rights.

See also J.A. 115, 119. On December 3, 1991, the court then entered a preliminary injunction that continued the prohibition against repatriations. DX 120. The court relied on what it found to be a First Amendment right of plaintiff HRC to have access to the interdictees, and on Article 33.1 of the United Nations Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150 (J.A. 385-406), which provides that a Contracting State shall not "expel or return ('refouler')" a refugee to a country where his life or freedom would be threatened on account of political opinion.[3] At the same time, the court rejected the claim by the class of present and future interdictees under 8 U.S.C. 1253(h), explaining that "the statutory rights and protections asserted are reserved, by the very terms of the

[3] The United States acceded to Article 33.1 of the Convention by ratifying the U.N. Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577, 189 U.N.T.S. 150 (J.A. 406-412).

statute[ ], to aliens within the United States." DX 120, at 53.

The Eleventh Circuit reversed the preliminary injunction, Pet. App. 171a-189a (*HRC I*), but the district court immediately entered further injunctions on other grounds. See Pet. App. 199a-202a. In late January 1992, the government sought emergency relief from the Eleventh Circuit, supported by evidence that the bar to repatriations was exacerbating the crisis by providing an incentive for Haitians to take to the seas. When the Eleventh Circuit failed to act promptly, the government sought a stay in this Court. This Court granted a stay the next day, and thus permitted repatriations to resume. 112 S. Ct. 1072 (1992). A few days later, the Eleventh Circuit reversed the remaining injunctions and ordered dismissal of the suit. Pet. App. 190a-252a (*HRC II*). It expressly rejected the Haitian plaintiffs' claim under 8 U.S.C. 1253(h), explaining that Section 1253(h) "is found in Part V of the INA" and that "[t]he [relevant] provisions of Part V * * * only apply to aliens 'in the United States.'" Pet. App. 215a (quoting 8 U.S.C. 1251, 1253(a)). This Court denied the *HRC* plaintiffs' certiorari petition on February 24, 1992. 112 S. Ct. 1245.

3. Less than a month later, respondents filed this suit in the Eastern District of New York, raising essentially the same challenges to the interdiction program that had been rejected in *HRC*. See J.A. 14-37 (2d Amend. Compl.). On April 6, 1992, the district court, relying on the First Amendment and the Due Process Clause, entered a preliminary injunction that (i) required petitioners to grant the respondent organizations "access" to interdictees housed at Guantanamo, and (ii) enjoined petitioners from reinterviewing or repatriating any interdictee who had been "screened in," without first allowing him to communicate with a lawyer. Pet. App. 142a-163a.[4] The

[4] The government had continued the practice of paroling into the United States under 8 U.S.C. 1182(d)(5) most Haitian migrants who

court certified a class of "screened in plaintiffs" entitled to that relief. *Id.* at 161a-162a. After unsuccessfully seeking a stay in the court of appeals, the government sought relief in this Court, which granted a stay on April 22, 1992. 112 S. Ct. 1714.

On June 10, 1992, the court of appeals vacated those portions of the preliminary injunction that required the government to grant the respondent organizations access to Guantanamo, but affirmed the prohibition against further processing or repatriation of "screened in" interdictees without affording them an opportunity to communicate with a lawyer. Pet. App. 73a-124a. On September 22, 1992, we filed a certiorari petition seeking review of the court of appeals' June 10 decision. See *McNary* v. *Haitian Centers Council, Inc.*, No. 92-528.

4. In May 1992, while the government's appeal of the preliminary injunction granting the respondent organizations access to Guantanamo was still pending before the Second Circuit, the number of individuals leaving Haiti surged dramatically: nearly 10,500 Haitians were interdicted in the first 20 days of that month, exceeding the total for the prior three months combined. By May 20, the tent camp at Guantanamo was nearing capacity. Leahy Decl. ¶¶ 5-6 (DX 152; J.A. 232); Allen Decl. ¶¶ 2-3 (DX 153; J.A. 239-240). For that reason, and to avoid dangerous overloading of its cutters, the Coast Guard issued orders to interdict only boats in imminent danger of foundering. But the migration continued, in unseaworthy and overloaded boats. At about the same time, a Haitian boat capsized off Cuba, resulting in the death of approximately half the forty migrants aboard. Leahy Decl. ¶¶ 6, 7 (J.A.

---

made a sufficient threshold showing to be screened in. The INS decided, however, to reinterview at Guantanamo those interdictees who were tentatively screened in but found to have a communicable disease (most often the HIV virus) that rendered them excludable under 8 U.S.C. 1182(a)(1)(A)(i) (Supp. II 1990). See Pet. App. 82a-83a, 147a; 92-528 Pet. 6-8, 12-13 & n.13.

232). In addition, the State Department believed that a massive outmigration would make the United States "vulnerable to pressure tactics from the de facto authorities in Haiti * * * to abandon the embargo and other measures designed to speed the return of democracy." Kanter Decl. ¶ 4 (DX 154; J.A. 243).

At this juncture, the President had limited options. In light of the saturation of Guantanamo and Coast Guard cutters, the unwillingness of third countries to accept significant numbers of Haitian migrants, and the continuing massive outflow and risk of loss of life, the only practicable alternatives were either to bring all interdictees directly to the United States for screening, or to repatriate them all to Haiti immediately upon interdiction. Based on the judgment that the former course would precipitate a further outflow of a magnitude as yet unknown (with an even greater prospect of chaos and loss of life), the President concluded that all interdictees should be repatriated directly to Haiti. That conclusion was embodied in Executive Order No. 12,807, 57 Fed. Reg. 23,133 (1992) (J.A. 376-379), issued May 24, 1992, which replaced the 1981 Executive Order.[5] At the same time, the President decided to provide all Haitians access to processing of applications for refugee admission to the United States at our Embassy in Port-au-Prince, pursuant to 8 U.S.C. 1157 (Kanter Decl. ¶¶ 8, 10-11 ; J.A. 244-246), and to assure adequate Embassy staffing for that purpose. The President also ordered an immediate increase in humanitarian aid for the people of Haiti, and called on the international community to fur-

---

[5] Although the 1992 Executive Order does not require screening of interdictees, it provides that "the Attorney General, in his unreviewable discretion, may decide that a person who is a refugee will not be returned without his consent." § 2(c)(3) (J.A. 378). Under Coast Guard instructions, an interdictee will not be repatriated immediately to Haiti if the commanding officer believes that he would be in immediate and exceptionally grave physical danger. In that situation, the commanding officer is to provide temporary refuge and seek direction from higher authority. Leahy Decl. ¶ 12 (J.A. 234).

nish additional assistance. 28 Weekly Comp. Pres. Doc. 924 (1992) (J.A. 245-246). We have been informed by the State Department that as of October 30, 1992, it had received applications on behalf of 15,566 persons since refugee processing began in Haiti earlier this year, that INS had adjudicated 2505 applications, and that 245 applications had been approved.

5. On May 27, 1992, respondents applied for a temporary restraining order to bar implementation of the May 24 Executive Order. Treating the application as a motion for a preliminary injunction, the district court denied relief. Pet. App. 164a-168a. It held, *inter alia*, that "Section [1253(h)] is * * * unavailable as a source of relief for Haitian aliens in international waters." *Id.* at 167a-168a.

6. On July 29, 1992, a divided Second Circuit panel reversed and ordered entry of a preliminary injunction, albeit without addressing the government's argument that the INA precludes judicial review of the interdiction program. Pet. App. 1a-72a.

a. The majority first held that the Haitian plaintiffs' claim under 8 U.S.C. 1253(h) is not barred under collateral estoppel principles by the Eleventh Circuit's holding in *HRC II* that Section 1253(h) does not apply to aliens outside the United States. Pet. App. 7a-14a. The majority acknowledged that the *HRC* class includes "all Haitian aliens who are currently detained or who will in the future be detained * * * who were interdicted on the high seas pursuant to the United States Interdiction Program." *Id.* at 7a. But it believed that the class here consists of different plaintiffs, on the theory that interdictions after May 24 are not pursuant to the "United States Interdiction Program" referred to in *HRC*, but pursuant to a "different" program that provides for repatriation without screening. *Id.* at 9a-11a. The majority also expressed the view that collateral estoppel should not apply because the May 1992 Executive Order constituted "an intervening change in the applicable legal context," because "few judicial resources would be saved by

collaterally estopping these plaintiffs," and because "[t]he federal judicial hierarchy deserves this opportunity to consider this weighty issue on the merits." *Id.* at 12a-14a.

Reaching the merits, the majority held that 8 U.S.C. 1253(h) applies to aliens outside the United States. It acknowledged the presumption against extraterritorial application of federal statutes, but found the presumption overcome here by the reference in Section 1253(h) to "any alien." Pet. App. 15a-18a. The majority disagreed with the Eleventh Circuit's view in *HRC II* that the various references in Part V of the INA to aliens "in the United States" establish that Section 1253(h) is so limited. *Id.* at 19a-21a. The government also argued that its interpretation of Section 1253(h) is supported by Article 33.1 of the U.N. Convention, to which Section 1253(h) was meant to conform, pointing out that the May 1992 Executive Order formally construes Article 33.1 not to apply to aliens outside the territory of a Contracting State. The majority, however, rejected the President's construction of Article 33.1 (Pet. App. 23a-35a), labeling it a "litigating posture" (*id.* at 30a, 31a), and held that Section 1253(h) creates a right of non-repatriation that is independent of the rest of Part V of the INA. *Id.* at 35a.

b. Judge Walker dissented. Pet. App. 43a-62a. He would have found the interdictees' claim barred by collateral estoppel, *id.* at 43a-52a, because extraterritorial application of Section 1253(h) was rejected in *HRC*, and because the certified class in this case ("all Haitian citizens who have been or will be screened in") is included within the *HRC* class of Haitians "who are currently detained or who in the future will be detained." *Id.* at 45a-46a. Judge Walker disagreed with the majority's view that the May 1992 Executive Order constituted an "intervening change" justifying a refusal to apply collateral estoppel, *id.* at 46a-49a, noting that "the legal grounds *upon which th[e] prior litigation was resolved*" have not changed. *Id.* at 49a-50a. On the merits, Judge Walker found the language of 8 U.S.C. 1253(h) ambiguous, Pet. App. 52a-55a, but con-

cluded that the background of the 1980 amendments—including the parallel provisions of Article 33 of the Convention—made it clear that Section 1253(h) does not apply outside the United States. Pet. App. 55a-68a.

7. Later in the day on July 29, 1992, the district court entered a preliminary injunction in accordance with the court of appeals' decision, barring repatriation to Haiti of "any interdicted Haitian" whose life or freedom would be threatened on account of his or her political opinion. Pet. App. 169a-170a. On August 1, 1992, this Court granted petitioners' application for a stay of the court of appeals' judgment and the district court's injunction.

INTRODUCTION AND SUMMARY OF ARGUMENT

The May 24, 1992, Executive Order represents the President's considered response to a life-threatening crisis on the high seas. By enjoining the President's action, the court of appeals has interfered directly with the operation of military vessels under his command and upset the delicate balance of diplomatic and other measures he instituted to resolve the broader crisis concerning that country. The effect can only be to encourage yet another massive outmigration from Haiti. The court of appeals' ruling, however, rests on four fundamental errors, each sufficient in itself to require reversal.

I. The INA precludes judicial review in this case. Congress expressly authorized review of determinations affecting aliens who are in the United States or at our borders and subject to deportation or exclusion proceedings. See 8 U.S.C. 1105a. The marked absence of comparable provisions for aliens beyond our shores impliedly precludes judicial review at their behest. Moreover, Congress enacted 8 U.S.C. 1105a in 1961 to confine judicial review of exclusion orders to habeas corpus proceedings, and thereby to overturn *Brownell* v. *Tom We Shung*, 352 U.S. 180 (1956), which held that such orders were also subject to review in a declaratory judgment action under the APA. *A fortiori*, APA review

is not available to aliens who have not even reached our shores. That conclusion is reinforced by the nature of the action respondents challenge—a policy instituted by the President pursuant to broad statutory authority, implemented on the high seas using military vessels, and integrated into the Nation's overall response to the international crisis concerning Haiti.

II. Respondents' claim that 8 U.S.C. 1253(h) prohibits their repatriation to Haiti is foreclosed under the doctrine of collateral estoppel by the Eleventh Circuit's decision in *HRC* v. *Baker*, which rejected such a claim. The plaintiffs in this case do not fall outside the *HRC* class on the theory that the "Interdiction Program" referred to in the *HRC* class definition ended with the 1992 Executive Order. The interdiction program was established by the 1981 Presidential Proclamation, which remains in effect. The 1992 Executive Order merely prescribed different procedures *after* interdiction. Nor has there been any amendment of 8 U.S.C. 1253(h) or other change in the legal principles on which the Eleventh Circuit relied in *HRC* that could render collateral estoppel inapplicable.

III. On the merits, the court of appeals' holding that 8 U.S.C. 1253(h) applies to aliens on the high seas cannot be reconciled with the presumption against extraterritorial application of Acts of Congress, because there is no clear expression of congressional intent to apply Section 1253(h) outside the United States.

Paragraph (1) of Section 1253(h) provides that "[t]he Attorney General shall not deport or return any alien" to a country if he determines that the alien would be threatened with persecution. Section 1253(h) speaks only to the Attorney General because it is located in Part V of the INA, which prescribes procedures for expelling aliens from the United States—a matter for which the Attorney General is responsible. There is no mention of the Coast Guard or any other agency that might encounter a potential refugee *outside* the United States. Furthermore, numerous provisions in Part V of the INA—

including paragraph (2) of Section 1253(h) itself—expressly refer to aliens "in the United States," thereby confirming that Section 1253(h) applies only to such aliens.

This interpretation of Section 1253(h) is confirmed by Article 33 of the U.N. Convention Relating to the Status of Refugees, after which Section 1253(h) was patterned. The President has formally construed Article 33 not to apply outside United States territory, and that interpretation is entitled to great weight. Nothing in paragraph 1 of Article 33—which provides that a Contracting State shall not "expel or return ('refouler')" a refugee—is to the contrary. The word "expel" in Article 33 obviously refers to an alien in the Contracting State, and one meaning of the French word "refouler" is "expel (aliens)," which indicates that the term "return ('refouler')" in Article 33 rests on a parallel territorial premise. Moreover, paragraph 2 of Article 33 expressly contemplates that a refugee protected by that Article has already arrived in his country of refuge. This territorial premise is woven into numerous other provisions of the Convention as well. In addition, the negotiating history conclusively demonstrates that this indeed was the parties' intent, and Article 33 was interpreted in that manner when the United States acceded to the Convention in 1968, when 8 U.S.C. 1253(h) was amended to conform to Article 33 in 1980, and when the State Department addressed the issue in a formal policy statement in 1972, congressional testimony, and international negotiations.

Contrary to the court of appeals' view, the 1980 amendments to 8 U.S.C. 1253(h) that deleted the phrase "within the United States" did not extend it to aliens beyond our borders. The legislative history of those amendments shows that they had the far more modest purpose of applying Section 1253(h) in exclusion as well as deportation proceedings, because *Leng May Ma* v. *Barber*, 357 U.S. 185 (1958), had relied on the phrase "within the United States" in holding that the prior version of Section 1253(h) did not apply in exclusion proceedings.

IV. Equitable principles in any event foreclose an award of injunctive relief to aliens outside the United States that bars implementation of the President's directives in this sensitive area of military operations and foreign policy.

ARGUMENT

THE COURT OF APPEALS IMPROPERLY ENJOINED IMPLEMENTATION OF THE PRESIDENT'S DIRECTIVE IN EXECUTIVE ORDER 12,807 TO REPATRIATE INTERDICTED HAITIAN MIGRANTS DIRECTLY TO HAITI

I. JUDICIAL REVIEW OF THE PRESIDENT'S POLICY IS PRECLUDED BY THE IMMIGRATION AND NATIONALITY ACT

The Haitian plaintiffs in this case—aliens who are outside the United States—have no basis for invoking the jurisdiction of U.S. courts to seek the extraordinary relief ordered here. The only plausible basis for judicial review would be the cause of action established by the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.* But as the Eleventh Circuit held in *HRC II*, Pet. App. 204a-209a, the INA impliedly "preclude[s] judicial review" under the APA in this setting. See 5 U.S.C. 701(a)(1).[6]

Whether a statute precludes judicial review "is determined not only from its express language, but also from the structure of the statutory scheme, its objectives, its legislative history, and the nature of the administrative action involved." *Block* v. *Community Nutrition Inst.*, 467 U.S. 340, 345 (1984); accord, *Department of the Navy* v. *Egan*, 484 U.S. 518, 530 (1988); *NLRB* v. *United Food & Commercial Workers Union*, 484 U.S. 112, 131-133 (1987); see also *Switchmen's Union* v. *National Mediation Bd.*, 320 U.S. 297, 301 (1943) ("type of problem involved" and "history of the statute" are "highly relevant"). Furthermore, any "presumption" of reviewability "runs

[6] For the reasons stated in Point II, *infra*, the Eleventh Circuit's holding in *HRC II* that the INA precludes judicial review pursuant to the APA, Pet. App. 214a-216a, binds respondents here under collateral estoppel principles. See Pet. 13 n.7.

aground when it encounters concerns of national security," *Egan*, 484 U.S. at 527—including, here, the President's conduct of foreign relations and his institution of measures outside the United States to protect the Nation's borders.[7] These considerations require the conclusion that the INA forecloses review of the President's action.

A. The INA prescribes detailed procedures for administrative and judicial review of refugee and other determinations made with respect to aliens who have arrived in the United States but, in marked contrast, the Act contains no comparable provisions for administrative or judicial review at the behest of aliens outside the United States. Thus, the Act establishes detailed procedures for administrative hearings in both exclusion and deportation cases, 8 U.S.C. 1226, 1252, and specifically provides in 8 U.S.C. 1105a for judicial review. Section 1105a(a) states that the procedure established by 28 U.S.C. 2341-2351, which provides for judicial review directly in the courts of appeals, "shall be the sole and exclusive procedure" for judicial review of final orders of deportation made under 8 U.S.C. 1252(b) against aliens "within the United States." Section 1105a(b) states that, "[n]otwithstanding the provisions of any other law," an alien against whom a final order of exclusion has been made under 8 U.S.C. 1226 "may obtain judicial review of such order by habeas corpus proceedings and not otherwise." This

[7] Even where it applies, "[t]he presumption favoring judicial review of administrative action is just that—a presumption." *Community Nutrition Inst.*, 467 U.S. at 341. And although the Court has observed that the presumption may be overcome only upon a showing of "clear and convincing evidence," the Court has never applied that standard "in the strict evidentiary sense"; it is sufficient that "the congressional intent to preclude judicial review is 'fairly discernible in the statutory scheme.'" *Id.* at 350-351 (quoting *Data Processing Serv.* v. *Camp*, 397 U.S. 150, 157 (1970)).

provision likewise is available only to aliens who have already arrived at our borders.[8]

By contrast, 8 U.S.C. 1157, which confers discretionary authority on the President and the Attorney General with respect to aliens *outside* the United States who seek refugee status, does *not* provide for either administrative or judicial review. *HRC II*, Pet. App. 206a. Accordingly, Congress's intent to preclude judicial review for such aliens is " 'fairly discernible' in the detail of the legislative scheme," *Community Nutrition Inst.*, 467 U.S. at 351, for where "a statute provides a detailed mechanism for * * * judicial review of particular issues at the behest of [particular] persons, judicial review of those issues at the behest of other persons [is] impliedly precluded." *Id.* at 349; see also *United States* v. *Fausto*, 484 U.S. 439, 448-449 (1988); *United States* v. *Erika, Inc.*, 456 U.S. 201, 208 (1982). This result conforms to Congress's traditional unwillingness to permit judicial review of immigration decisions concerning aliens who have "never presented [themselves] at the borders." *Brownell* v. *Tom We Shung*, 352 U.S. 180, 184 n.3 (1956).[9]

B. When Congress enacted 8 U.S.C. 1105a(b) in 1961 (Pub. L. No. 87-301, § 5(a), 75 Stat. 651), it did so for the specific purpose of *precluding* APA suits to challenge

[8] See 8 U.S.C. 1226(a) (special inquiry officer has authority to determine whether an "arriving alien" who has been detained under 8 U.S.C. 1225 shall be allowed to enter or shall be excluded and deported); 8 U.S.C. 1225(a) (referring to aliens "arriving at ports of the United States," "being brought into the United States," or "coming into the United States"); 8 U.S.C. 1225(b) ("port of arrival").

[9] This principle is reflected in the settled rule that visa decisions by U.S. consular officers are unreviewable. See *Tom We Shung*, 352 U.S. at 185 n.6; *Li Hing of Hong Kong, Inc.* v. *Levin*, 800 F.2d 970, 971 (9th Cir. 1986); *Wan Shih Hsieh* v. *Kiley*, 569 F.2d 1179, 1181 (2d Cir.), cert. denied, 439 U.S. 828 (1978); *Te Kuei Liu* v. *INS*, 645 F.2d 279, 285 (5th Cir. 1981); *Pena* v. *Kissinger*, 409 F. Supp. 1182, 1185-1188 (S.D.N.Y. 1976). See also *HRC II*, Pet. App. 207a-209a (discussing *Cobb* v. *Murrell*, 386 F.2d 947 (5th Cir. 1967), and *Braude* v. *Wirtz*, 350 F.2d 702 (9th Cir. 1965)).

exclusion decisions. Prior to those amendments, this Court had held in *Tom We Shung* that an alien could challenge an order of exclusion in a declaratory judgment action brought under Section 10 of the APA, 5 U.S.C. 1009 (1952), rejecting the government's contention that judicial review was confined to habeas corpus proceedings, as it had been prior to enactment of the INA in 1952. See 352 U.S. at 182, 184-185. The House Report on the 1961 amendments contains an extensive discussion of *Tom We Shung*, and it expresses an intention to overrule that decision and to restore the prior practice of confining judicial review of exclusion matters to habeas corpus proceedings. See H.R. Rep. No. 1086, 87th Cong., 1st Sess. 30-33 (1961); compare *Ardestani* v. *INS*, 112 S. Ct. 515, 518-519 (1991). In light of Congress's preclusion of review under the APA even for aliens who have reached our borders, it follows *a fortiori* that aliens who have never reached our borders may not invoke the APA to challenge governmental actions in connection with their efforts to enter the United States.[10] See also H.R. Rep. No. 1086, *supra*, at 33 ("The sovereign United States cannot give recognition to a fallacious doctrine that an alien has a 'right' to enter this country which he may litigate in the courts of the United States against the U.S. Government as a defendant.").

It also is significant that even as the Court held in *Tom We Shung* that APA review was available to aliens who were challenging an order of exclusion, it pointedly did "not suggest, of course, that an alien who has never presented himself at the borders of this country may avail himself of the declaratory judgment action by bringing the action from abroad." 352 U.S. at 184 n.3. The Court also

[10] Aliens beyond our borders likewise have no right to challenge those governmental actions in habeas corpus proceedings, *Johnson* v. *Eisentrager*, 339 U.S. 763, 771, 777-781, 790-701 (1950); cf. *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 269, 271, 273-275 (1990), and indeed respondents have not sought habeas corpus relief.

quoted a passage in the 1952 Senate Report on the INA stating that although the INA then omitted a provision limiting judicial review of exclusion determinations to habeas corpus proceedings, that omission was "not intended to grant any review of determinations made by consular officers." 352 U.S. at 185 n.6 (quoting S. Rep. No. 1137, 82d Cong., 2d Sess. 28 (1952)). When Congress enacted 8 U.S.C. 1105a(b) in 1961 to overturn *Tom We Shung* in other respects, it did not disturb the settled understanding reflected in the Court's opinion that judicial review is not available to aliens outside the United States.

C. The "nature of the administrative action" respondents challenge and the "type of problem involved" also weigh heavily against recognizing a right of judicial review here. *Community Nutrition Inst.*, 467 U.S. at 345; *Switchmen's Union*, 320 U.S. at 301. The interdiction policy was instituted by the President pursuant to his broad statutory authority to protect the Nation's borders and to restrict entry of any aliens or class of aliens "[w]henever the President finds" that their entry "would be detrimental to the interests of the United States." 8 U.S.C. 1182(f).[11] The fact that the INA assigns this responsibility directly to the President is sufficient in itself to demonstrate that Congress did not contemplate any role for the courts. *Franklin* v. *Massachusetts*, 112 S. Ct. 2767, 2775-2776 (1992). So, too, is the fact that the Act grants authority in discretionary terms and conditions its exercise only upon a Presidential finding concerning the "interests of the United States," which renders the President's actions particularly unamenable to judicial scrutiny. *United States ex rel. Knauff* v. *Shaughnessy*,

[11] Similarly, 8 U.S.C. 1185(a)(1) grants the President broad discretion to impose restrictions on aliens attempting to enter the United States, and 14 U.S.C. 89(a) authorizes the Coast Guard (which operates under the direction of the President) to interdict vessels on the high seas where violations of U.S. law are concerned and to take "appropriate" action after doing so.

338 U.S. 537, 542-543 (1950); *Ludecke* v. *Watkins*, 335 U.S. 160 (1948); see also *Webster* v. *Doe*, 486 U.S. 592, 600 (1988); *Chicago & Southern Air Lines, Inc.* v. *Waterman Steamship Corp.*, 333 U.S. 103, 110-114 (1948); *United States* v. *George S. Bush & Co.*, 310 U.S. 371, 379-380 (1940).

The soundness of the INA's preclusion of review is especially evident in this case, because the measures respondents challenge—interdiction of aliens on the high seas and repatriation to a foreign country, through use of military vessels and as part of the United States' overall response to the international crisis affecting Haiti—are integral to the President's responsibilities as Commander in Chief (U.S. Const. Art. II, § 2, Cl. 1) and the "sole organ of the nation in its external relations," *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936). The courts should not review the President's orders in this setting in the absence of the clearest expression of congressional intent to allow them to do so. There simply is no such expression here.

II. RESPONDENTS' CLAIM UNDER 8 U.S.C. 1253(h) IS BARRED UNDER COLLATERAL ESTOPPEL PRINCIPLES BY THE ELEVENTH CIRCUIT'S JUDGMENT IN *HRC* v. *BAKER*

The statutory preclusion of review discussed in Point I, *supra*, is not the only obstacle to this suit. The doctrine of collateral estopped likewise bars respondents' challenge to the May 1992 Executive Order under 8 U.S.C. 1253(h), by virtue of the Eleventh Circuit's judgment in *HRC II*.

"[U]nder elementary principles of prior adjudication a judgment in a properly entertained class action is binding on class members in any subsequent litigation." *Cooper* v. *Federal Reserve Bank*, 467 U.S. 867, 874 (1984). Indeed, strict application of preclusion principles is essential to the proper functioning of the class action mechanism. As Judge Walker noted in dissent below, "[t]he policy behind the class action device is, of course, to facilitate the final determination of numerous claims in one suit. This policy

is not furthered by allowing subsequent collateral attacks by class members." Pet. App. 44a.

Although res judicata does not bar respondents' challenge to a change in policy that occurred after the conclusion of the *HRC* litigation, collateral estoppel does bar this challenge because the dispositive legal issues and the parties to the class simply have not changed. "Under collateral estoppel, once a court has decided an *issue* of fact or law necessary to its judgment, that decision may preclude relitigation of the *issue* in a suit on a different cause of action involving a party to the first case." *Allen* v. *McCurry*, 449 U.S. 90, 94 (1980) (emphasis added). Indeed, the distinctive feature of collateral estoppel (as opposed to res judicata) is precisely that it does *not* depend upon an identity between the causes of action asserted in prior and subsequent litigation. *Montana* v. *United States*, 440 U.S. 147, 154 (1979); 1B J. Moore, *Federal Practice* ¶ 0.441[2], at 724 (2d ed. 1992).

The Eleventh Circuit held in *HRC II* that 8 U.S.C. 1253(h) does not apply to aliens who are not "in the United States." Pet. App. 214a-216a. That ruling bound a class of "[a]ll Haitian refugees who are currently detained or who in the future will be detained on United States Coast Guard Cutters and at Guantanamo Naval Base or elsewhere who were or will be interdicted on the high seas pursuant to the United States Interdiction Program and who are being denied * * * procedural rights." *HRC* 2d Amend. Compl. (J.A. 115); Pet. App. 7a. The Haitian plaintiffs in this case fall squarely within that definition: they have been or will be interdicted on the high seas pursuant to the President's interdiction program, and as in *HRC*, they allege a lack of suitable screening procedures. The court of appeals nevertheless held that the Haitian plaintiffs in this case are not bound by the judgment in *HRC II*. Its analysis cannot withstand scrutiny.

A. The court below first held that the plaintiffs in this case do not fall within the class definition in *HRC* because the President's issuance of the May 1992 Executive Order

marked an end to the "United States Interdiction Program" referred to in *HRC*. Pet. App. 9a-11a. That is wrong. As Judge Walker noted, both the 1992 Executive Order and its predecessor were issued to carry out the 1981 Presidential Proclamation, which was entitled "High Seas Interdiction of Illegal Aliens." Pet. App. 47a; see pages 2-3, *supra*. It was the Proclamation, which remains in effect to this day, that established the interdiction program. Although the 1992 Executive Order changed the manner in which Haitian migrants are processed *after* they are interdicted, it did not end the ongoing interdiction program or eliminate the identity of the parties who have challenged the government's procedures as inadequate under 8 U.S.C. 1253(h) both before *and* after that Order.[12] Accordingly, *all* Haitian migrants repatriated pursuant to

[12] This conclusion is supported by the complaint in *HRC*. Paragraph 32 of that complaint leads off its factual description of the "Interdiction Program" by stating: "On September 29, 1981, the President issued Proclamation 4865, FR Doc. 81-28828, 46 Fed. Reg. 48107 ('the Proclamation'), which announced a program of 'interdiction: on the high seas of vessels transporting aliens.'" J.A. 106. The "United States Interdiction Program" mentioned in the class definition in paragraph 62(a) of the complaint (J.A. 115) presumably refers to the "program of 'interdiction'" mentioned in paragraph 32—a program embodied in the Proclamation. Furthermore, paragraph 62(a) describes three separate elements of class membership: it refers to all Haitian refugees (1) "who are currently detained or who in the future will be detained"; (2) "who were or will be interdicted on the high seas pursuant to the United States Interdiction Program"; and (3) "who are asserting violations of their * * * procedural rights." The "Interdiction Program" is mentioned only in the second of these elements, which is limited to the interdiction itself (*i.e.*, to the interception of vessels). The alleged violation of "procedural rights" resulting from repatriation without screening occurs only *after* interdiction, and it is covered by a separate element of the class definition that does not refer to the "Interdiction Program." Accordingly, although respondents allege that elimination of screening constitutes a new type of post-interdiction "procedural violation," it does not constitute a new "Interdiction Program."

the 1992 Executive Order fall squarely within the class certified in *HRC*.[13]

The *HRC* plaintiffs did not draft their class definition with the intention of placing narrow limits on the scope of the class. Rather, they sought to ensure adjudication of the rights of *all* Haitian migrants who might thereafter be interdicted on the high seas and who might therefore benefit from a holding that 8 U.S.C. 1253(h) applies in that setting—a class that unquestionably includes the Haitian plaintiffs in this case. Moreover, insofar as the extraterritorial application of Section 1253(h) is concerned, Haitian migrants interdicted prior to May 24, 1992, share a community of interests with those interdicted thereafter. It accordingly is entirely fair that the plaintiffs in this case who invoke Section 1253(h) to challenge the 1992 Executive Order are bound by the judgment in *HRC II*.

B. The court of appeals also held that respondents' claims under 8 U.S.C. 1253(h) are not precluded by the judgment in *HRC II* because the 1992 Executive Order constituted "an intervening change in the applicable legal context." Pet. App. 12a. That exception to ordinary preclusion principles, however, applies only where there have been "modifications in 'controlling legal principles,' [which] * * * could render a previous determination inconsistent with prevailing doctrine." *Montana*, 440 U.S. at 161. We may assume that collateral estoppel would be inapplicable here under that exception if Congress had amended 8 U.S.C. 1253(h), or if this Court had issued an intervening decision establishing that the Eleventh Circuit's holding in *HRC II* concerning the scope of Sec-

[13] Ironically, the only class certified thus far by the district court in the present case consists of Haitian migrants who were "screened in" under the policy that was in effect prior the May 1992 Executive Order. Pet. App. 162a. Even if the court of appeals were correct that the "United States Interdiction Program" referred to in *HRC* ended on May 24, *all* members of the certified class here were interdicted under that Program, and thus fall within the *HRC* class definition. See also Reply Br. Pet. Stage 6-7 n.4.

tion 1253(h) was erroneous.[14] But here no change has been wrought in the legal principles on which the Eleventh Circuit relied in *HRC* in sustaining the government's practices. All that has happened is that the President has modified those practices in certain respects by issuing the 1992 Executive Order. That Order necessarily assumes the correctness of the Eleventh Circuit's holding that Section 1253(h) is inapplicable to Haitian migrants interdicted on the high seas, and it therefore is in conformity with the "applicable legal context" that controlled the decision in *HRC II*. Moreover, a change in the defendants' own conduct manifestly does not constitute an "intervening change" in the controlling principles under which the legality of that conduct must be evaluated. It therefore does not fall within the exception on which the court below relied. See Pet. App. 49a-50a (Walker, J., dissenting); 18 C. Wright *et al.*, *Federal Practice and Procedure* § 4425, at 259 (1981); Restatement (Second) of Judgments § 28(2)(b) and comment c (1982); see, *e.g.*, *Commissioner* v. *Sunnen*, 333 U.S. 591, 598-600 (1948).[15]

---

[14] Even then, however, the proper course would be for respondents and other Haitians who are members of the *HRC* class to file a motion for relief from the judgment in *HRC* itself, on the ground that "it is no longer equitable that the judgment should have prospective application" in light of the intervening amendment or ruling, or that the new development constitutes a "reason justifying relief from the operation of the judgment." Fed. R. Civ. P. 60(b)(5)-(6); cf. *Rufo* v. *Inmates of Suffolk County Jail*, 112 S. Ct. 748, 762-763 (1992).

[15] The court of appeals did not suggest that the May 1992 Executive Order constituted a change in *facts* essential to the judgment in *HRC II* that would render collateral estoppel inapplicable. See *Montana*, 440 U.S. at 159-160. In rejecting the *HRC* plaintiffs' claims under 8 U.S.C. 1253(h), the Eleventh Circuit did not rely on any determination as to the existence or adequacy of the refugee screening procedures then in place; it held that 8 U.S.C. 1253(h) is altogether inapplicable to aliens outside the United States. Pet. App. 214a-216a; see Pet. App. 84a-85a (Walker, J., dissenting). Accordingly, a modification or elimination of screening procedures does not alter any of the facts on which the judgment in *HRC II* necessarily rested. Compare *Montana*, 440 U.S. at 158-162.

In a related vein, the court of appeals adverted (Pet. App. 12a) to this Court's observation that preclusion "may be inappropriate" in successive cases involving "unmixed questions of law," although the court of appeals omitted any mention of the further requirement that the successive cases be ones involving "substantially unrelated claims." *Montana*, 440 U.S. at 162-164; *United States* v. *Moser*, 266 U.S. 236, 242 (1924). The precise scope of this exception "may be difficult to delineate," but this case, like *Montana*, "poses no such conceptual difficulties." 440 U.S. at 163. Because this suit was filed shortly after the judgment in *HRC II* became final and involves the same interdiction program, "the legal 'demands' of this litigation are closely aligned in time and subject matter to those in [*HRC*]." *Ibid.*, see also *United States* v. *Stauffer Chem. Co.*, 464 U.S. 165, 172 (1984).

C. The court of appeals sought to bolster its refusal to apply collateral estoppel by expressing the view that the government had contravened "representations" made in its brief in opposition to the certiorari petition in *HRC*. Pet. App. 13a-14a. This reasoning is seriously flawed.

1. The court's suggestion that the government acted in bad faith—epitomized by its characterization of the government's conduct as "gamemanship of the rankest sort," Pet. App. 40a (Newman, J., concurring)—is entirely unfounded. Although the brief in opposition in *HRC* described the government's then-current policy, it did not purport to guarantee that the policy would remain unchanged, and it would have been irresponsible to do so; in fact, the brief emphasized (at 8, 10, 16) the need for the President to retain broad discretion to act without judicial interference. The May 1992 Executive Order was issued three full months after this Court denied certiorari in *HRC*, and it responded to a massive new wave of Haitian out migration and the resulting absence of available space in the camps at Guantanamo. See pages 6-7, *supra*. The record thus refutes any suggestion that the government

deliberately concealed an intention to change its policy in an effort to prevent review by this Court.[16]

2. As the court below recognized, "[a] discretionary denial of review * * * does not deprive a ruling of preclusive effect." Pet. App. 13a (citing Restatement (Second) of Judgments § 28 comment a). It follows that the contents of the government's brief opposing discretionary review by this Court of the Eleventh Circuit's judgment in *HRC II* does not deprive that judgment of its binding effect. See Pet. App. 51a (Walker, J., dissenting).

The court of appeals apparently thought that it nevertheless was free to dispense with collateral estoppel in these circumstances on equitable grounds, for it elsewhere recited the proposition that issue preclusion may be inappropriate where "a new determination is warranted in order * * * to avoid inequitable administration of the laws." Pet. App. 11a (quoting Restatement (Second) of Judgments § 28(2)(b), at 273). But that proposition does not give the courts free-roving power to dispense with collateral estoppel whenever they believe it would be "equitable" to do so. Rather, it applies where preclusion would be "inequitable" in the sense of subjecting similarly-situated parties to inconsistent legal regimes, *O'Leary* v. *Liberty Mut. Ins. Co.*, 923 F.2d 1062, 1069-1070 (3d Cir. 1991); *Clark-Cowlitz Jt. Operating Agency* v. *FERC*, 826 F.2d 1074, 1080 n.5 (D.C. Cir. 1987) (en banc); *Staten Island Rapid Transit Operating Auth.* v. *ICC*, 718 F.2d 533, 542 (2d Cir. 1983), and is therefore closely related to the principle that intervening changes in controlling law may make issue preclusion inapplicable. See Restatement

[16] Although the brief in opposition discussed (at 2-3) the screening procedures, that was hardly the focus of the argument against certiorari. The brief explained (at 9, 13-14, 18-20) that the Eleventh Circuit was correct in holding that 8 U.S.C. 1253(h) does not apply to migrants encountered on the high seas and that there was no conflict among the courts of appeals, but it did not contend that the then-current screening policy made the case an inappropriate "vehicle" for this Court's consideration of the statutory issue.

(Second) of Judgments, § 28 comment c, at 276-277; 1B J. Moore, *Federal Practice*, *supra*, ¶ 0.448, at 845, 848; see, *e.g.*, *Limbach* v. *Hooven & Allison Co.*, 466 U.S. 353, 362-363 (1984); *Sunnen*, 333 U.S. at 599. Adherence to collateral estoppel produces no such inequity in this case, because *all* interdicted Haitian migrants continue to be bound by the *HRC II* holding that 8 U.S.C. 1253(h) is inapplicable on the high seas.[17]

3. A novel exception to established preclusion principles based on circumstances surrounding a denial of certiorari would be unsound in any event. This Court does not sit as a court of error; its essential function is to superintend the orderly development of federal law. See Sup. Ct. R. 10.1. Although the Court's certiorari decisions are undoubtedly influenced by additional factors, the primary focus is on the significance of the legal issues presented, rather than the importance of the case to a particular party. Thus, a change in circumstances that were not essential to the prior judgment is unlikely to have significantly affected this Court's decision to grant or deny certiorari. Moreover, an exception based on such considerations would plunge the lower courts into pure speculation and undermine the certainty and repose that preclusion principles are intended to promote .[18]

[17] Nor may federal courts decline to apply issue preclusion simply because the legal question is important or because the correctness of the prior decision is not free from doubt, as the majority below also suggested. Pet. App. 13a-14a; *id.* at 41a (Newman, J., concurring); see *McCurry*, 449 U.S. at 101; 18 C. Wright *et al.*, *supra*, § 4426, at 265 ("If relitigation were permitted whenever it might result in a more accurate determination, in the name of 'justice,' the very values served by preclusion would be quickly destroyed.").

[18] To determine whether a change in circumstances involves facts essential to a prior judgment requires a relatively straightforward inquiry, based on a reading of the earlier court's opinion and an assessment of whether its analysis might have produced a different result if it had been applied to the facts in the second case. See *Montana*, 440 U.S. at 158-162. But because this Court does not typically explain its decisions to deny certiorari, there is no

D. Consistent application of preclusion principles "is central to the purpose for which civil courts have been established," because it protects litigants "from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions." *Montana*, 440 U.S. at 153-154. The court of appeals ignored these considerations, explaining only that "[s]ince the dispositive question—whether § 243(h) of the INA applies to conduct of the United States outside of our territorial waters—is one purely of law, few judicial resources would be saved by collaterally estopping these plaintiffs from litigating this issue." Pet. App. 12a-13a. But the course of this litigation—which has replicated the *HRC* experience of a sequence of temporary restraining orders and preliminary injunctions, expedited briefings and hearings, and repeated stay applications to the court of appeals and this Court—belies any notion that the "legal" character of the issues permits them to be resolved without significant adverse effect on the parties, the judicial system, and the national interest.

The United States prevailed in *HRC* after a full and fair hearing, and it was entitled to rely on that decision and avoid reinstatement of intrusive injunctions of the kind that the Eleventh Circuit set aside. Had the plaintiffs prevailed in *HRC II*, the government could hardly have escaped the preclusive effect of that judgment by eliminating refugee screening and announcing that a new interdiction program was in effect. It is no more just or

---

comparably reliable means of determining what factual alterations might have induced the Court to grant review. See *Singleton* v. *Commissioner*, 439 U.S. 940, 942-946 (1978) (Stevens, J., respecting the denial of certiorari). Moreover, an exception to collateral estoppel that attached significance to non-essential facts before the Court when certiorari was denied would encourage litigants to file meritless certiorari petitions in the hope of forestalling application of collateral estoppel in subsequent cases.

equitable to invoke that rationale to permit the plaintiffs to relitigate an issue previously resolved against them.

III. 8 U.S.C. 1253(h) DOES NOT APPLY TO ALIENS OUTSIDE THE UNITED STATES

If the Court reaches the merits, it should reverse the court of appeals' holding that 8 U.S.C. 1253(h) prohibits implementation of the President's policy of repatriating interdicted Haitian migrants directly to Haiti. Section 1253(h) has no application to aliens outside the United States.

Section 1253(h) must be construed in light of the "long-standing principle of American law" that an Act of Congress is presumed "to apply only within the territorial jurisdiction of the United States" unless there is a "clearly expressed," "affirmative intention" by Congress to the contrary. *EEOC* v. *Arabian American Oil Co.*, 111 S. Ct. 1227, 1230 (1991) (quoting *Foley Bros., Inc.* v. *Filardo*, 336 U.S. 281, 285 (1949), and *Benz* v. *Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, 147 (1957)). That is especially so where, as here, it is contended that the Act confers a right on *aliens* outside the United States, *Arabian American Oil*, 111 S. Ct. at 1234; *Foley Bros.*, 336 U.S. at 286—indeed, a right enforceable against the United States in United States courts. The presumption bars application of federal statutes to the high seas as well as foreign countries, for "[w]hen it desires to do so, Congress knows how to place the high seas within the jurisdictional reach of a statute." *Arabian American Oil*, 111 S. Ct. at 1235 (quoting *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428, 440 (1989)). The requirement of a "clear statement" to that effect "assure[s] that the legislature has in fact faced, and intended to bring into issue, the critical matters involved" in extending the statute beyond our borders. *Astoria Fed. Sav. & Loan Ass'n* v. *Solimino*, 111 S. Ct. 2166, 2170 (1991).

The presumption against extraterritoriality is powerfully reinforced here by the principle that statutes should

be construed so as not to interfere with foreign policy, *Weinberger* v. *Rossi*, 456 U.S. 25, 31-32 (1982); *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 19 (1963); *Benz*, 353 U.S. at 147, or with the constitutional responsibilities and prerogatives of the President, *Franklin*, 112 S. Ct. at 2775-2776; *Public Citizen* v. *United States Dep't of Justice*, 491 U.S. 440, 465-467 (1989); *Waterman Steamship Corp.*, 333 U.S. at 110-112. Furthermore, as this Court has repeatedly held, the power to exclude aliens, or to admit them on specified conditions, is "inherent in sovereignty, necessary for maintaining normal international relations and defending the country against foreign encroachments and dangers." *Kleindienst* v. *Mandel*, 408 U.S. 753, 765 (1972); see also *Landon* v. *Plasencia*, 459 U.S. 21, 33 (1982); *Fiallo* v. *Bell*, 430 U.S. 787, 792 (1977); *Knauff*, 338 U.S. at 542; *Fong Yue Ting* v. *United States*, 149 U.S. 698, 707-709 (1893); *Nishimura Ekiu* v. *United States*, 142 U.S. 651, 659-660 (1892). In the absence of a clear statement, an Act of Congress should not be construed to interfere with that fundamental attribute of sovereignty by barring measures undertaken by the President, pursuant to express statutory authorization, to prevent illegal entry of aliens.

In this case, there is no affirmative indication whatever —much less a "clear statement"—that Congress intended 8 U.S.C. 1253(h) to apply to all actions of the U.S. Government outside the United States, and thereby to confer on aliens anywhere in the world who are attempting illegal entry into the United States a right to avoid repatriation. Nor is there any indication that Congress "faced" the "critical matters involved," *Solimino*, 111 S. Ct. at 2170, in conferring such a right on aliens outside the United States that can be enforced in U.S. courts against the Executive Branch officials responsible for the operation of military vessels on the high seas pursuant to orders of the President. To the contrary, the conclusion that Section 1253(h) applies only to aliens who are physically present in the United States is supported by:

(a) the text of Section 1253(h) and the structure of the INA as a whole; (b) the parallel scope of Article 33 of the U.N. Convention Relating to the Status of Refugees, as reflected in its text, negotiating history, ratification, implementation, and formal interpretations by the State Department; and (c) the legislative history of the 1980 amendments to Section 1253(h).

A. The Text Of Section 1253(h) And The Structure of The Act Establish That Section 1253(h) Does Not Apply To Aliens Outside The United States

Nothing in the text of the INA supports the court of appeals' holding that 8 U.S.C. 1253(h) applies to actions of the Coast Guard or other Executive officials in carrying out the President's interdiction policy on the high seas.

1. a. Paragraph (1) of Section 1253(h) provides:

> The Attorney General shall not deport or return any alien * * * to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion.

By its terms, this provision applies to actions of the Attorney General. That is not surprising, because Section 1253(h) is located in the part of the INA that is concerned with procedures for removing aliens from the United States (INA Part V, 8 U.S.C. 1251-1260)—a matter for which the Attorney General is responsible. See 8 U.S.C. 1103; pages 35-36, *infra*. Neither Section 1253(h) nor any provision of Part V of the INA makes any mention of actions by the Coast Guard or any other agency that might encounter a potential refugee on the high seas or elsewhere outside the territory of the United States. Thus, even without regard to the presumption against extraterritoriality, the most natural reading of paragraph (1) of Section 1253(h) is that it bars the Attorney General from sending an alien *from* the United States *to* a foreign country in the specified circumstances.

b. Moreover, Section 1253(h) is triggered only "if the Attorney General determines" that the alien would be threatened with persecution. Cf. *Webster* v. *Doe*, 486 U.S. at 600. The Attorney General has made no such determination regarding Haitian interdictees who might be repatriated pursuant to the President's 1992 Executive Order, because the President decided that determinations concerning Haitians who want to enter the United States as refugees will now be made at our Embassy in Haiti, pursuant to 8 U.S.C. 1157. That policy decision comports with the text of Section 1253(h) and with the overall statutory scheme (of which Section 1253(h) is a part) that Congress established in 1980 to address refugee problems.

Section 1253(h) does not in itself either require the Attorney General to determine whether a particular alien would be subject to persecution in another country, or specify where or when such a determination must be made. Nor does it provide for the receipt of applications from aliens seeking relief. That is because other sections of the INA specify when and how such determinations must be made—and those sections confirm that the determinations referenced in Section 1253(h) are to be made only with respect to aliens in the United States.

The asylum provision of the INA, 8 U.S.C. 1158, specifically directs the Attorney General to "establish a procedure *for an alien physically present in the United States or at a land border or port of entry*, irrespective of such alien's status, to apply for asylum"; and it then provides that the Attorney General may, in his discretion, grant the alien asylum "if [he] determines" that the alien is a refugee within the meaning of the INA. 8 U.S.C. 1158(a) (emphasis added). This Section of the INA thus addresses the subject of refugee status for those aliens who have reached our shores. Under implementing INS regulations, an asylum application is deemed also to constitute an application for withholding of deportation under 8 U.S.C. 1253(h), which, if granted, would bar the subsequent removal of the alien from the United States

(either by deportation or exclusion) to a country in which he would be threatened with persecution. 8 C.F.R. 208.3(b), 208.16; see *INS* v. *Doherty*, 112 S. Ct. 719, 725 n.6 (1992); see also 8 U.S.C. 1252(b) (requiring the Attorney General to adopt procedures necessary to determine deportability of aliens in the United States). But nothing in the INA or implementing regulations provides for receipt of applications for asylum or withholding of deportation from aliens *outside* the United States who claim to be refugees.

Measures regarding refugees outside the United States are instead governed by 8 U.S.C. 1157. The admission of refugees under that Section is committed to the discretion of the President, who—after consultation with Congress, 8 U.S.C. 1157(d) and (e), and considering the "foreign policy interests of the United States," 8 U.S.C. 1157(e)(6)—establishes the total number of refugees to be admitted annually and allocates that quota among refugees from various regions and categories. 8 U.S.C. 1157(a). Within those allocations, the Attorney General then is authorized, in his discretion, to admit individual refugees who are determined to be "of special humanitarian concern to the United States." 8 U.S.C. 1157(c)(1). Implementing INS regulations provide for the filing of applications for admission with the overseas INS officer responsible for the geographic area in which the alien is located, 8 C.F.R. 207.1(a), 207.3, and for waiting lists and priority handling to assure orderly processing. 8 C.F.R. 207.5.

In contrast to the asylum regime established under 8 U.S.C. 1158 for aliens in the United States or at our borders, neither 8 U.S.C. 1157 nor implementing regulations provides for treating an application for discretionary refugee admission under Section 1157 as an application for withholding of deportation or return under Section 1253(h). That is because the *mandatory* relief afforded by Section 1253(h) is available only to aliens who are physically present in the United States. Congress made refugee policy concerning aliens on the high seas and elsewhere outside the United States *discretionary* with

the President under 8 U.S.C. 1157. The court of appeals' holding that Section 1253(h) applies to Haitian interdictees on the high seas thus is inconsistent with the framework established by the INA for addressing refugee problems.

c. The only textual basis the court of appeals cited for its contrary reading of Section 1253(h) was the reference in paragraph (1) to "any alien." In the court's view, that reference made it "plain" and "unambiguous" that Section 1253(h) applies to aliens outside the United States, because "aliens are aliens, regardless of where they are located." Pet. App. 16a; see also *id.* at 17a, 21a, 23a. The court's reasoning was both superficial and wrong. This Court made clear in *Foley Bros.* that such general references to the subject of the statute's regulation—without any further provision expressly giving that regulation an extraterritorial reach—do *not* overcome the presumption against extraterritoriality. Thus, in *Foley Bros.*, the Court held that a statute requiring an eight-hour day provision in "[e]very contract made to which the United States * * * is a party" was inapplicable to contracts for work performed in a foreign country. 336 U.S. at 282. In light of the premise that Congress "is primarily concerned with domestic conditions," *Arabian American Oil*, 111 S. Ct. at 1230, the term "any alien" in 8 U.S.C. 1253(h) (like the term "every contract" in the statute in *Foley*) must be understood to refer only to those in the United States.[19] See also *Lujan* v. *Defenders of Wildlife*, 112 S. Ct. 2130, 2150 n.4 (1992) (Stevens, J., concurring in the judgment) (Endangered Species Act's requirement that "[e]ach Federal agency" shall insure that "any action" it funds or carries out does not jeopardize "any" protected species "is

[19] Other provisions of the INA likewise use the phrase "any alien," without any basis for including aliens outside the United States. See, *e.g.*, 8 U.S.C. 1252(b) ("special inquiry officer shall conduct proceedings under this section to determine the deportability of any alien").

not sufficient to overcome the presumption against the extraterritorial application of statutes").[20]

The court of appeals also found it significant that the INA defines "alien" to mean "any person not a citizen or national of the United States." See Pet. App. 16a (quoting 8 U.S.C. 1101(a)(3)). That definition, however, merely identifies *who* is potentially covered by the INA; it does not specify *where* any particular provision of the INA applies. Moreover, the court of appeals' reliance on the statutory definition is foreclosed by *Arabian American Oil*. There, the Court held that the broad definitions of "employer," "commerce," and "industry affecting commerce" in 42 U.S.C. 2000e(b), (g) and (h) were insufficient to extend Title VII of the Civil Rights Act of 1964 beyond the territory of the United States. In so ruling, the Court reiterated its prior holdings that even where an Act of Congress has broad definitional or jurisdictional provisions, it must be interpreted to apply only to domestic conduct in the absence of "specific language" to the contrary, *McCulloch*, 372 U.S. at 19—*i.e.*, in the absence of "words which definitely disclose an intention to give it extraterritorial effect," *New York Central R.R.* v. *Chisholm*, 268 U.S. 29, 31 (1925). See 111 S. Ct. at 1232. The words "any alien" simply do not satisfy that standard. Neither the court of appeals nor respondents have identified any other "specific language" in paragraph (1) of Section 1253(h) (or elsewhere in the INA) that

[20] The court of appeals stated that the presumption against extraterritorial application "has no relevance in the present context." Pet. App. 17a. The court reasoned that the presumption "is a canon of construction " 'whereby *unexpressed* congressional intent may be ascertained,' " while here, in its view, Congress extended Section 1253(h) to the high seas by applying it to "any alien." *Ibid.* (quoting *Foley Bros.*, 336 U.S. at 285) (emphasis added). The court of appeals got it backwards. The presumption is not irrelevant in this case; it is the starting point of analysis. The general reference to "any alien" plainly does not constitute the sort of specific expression of congressional intent that is necessary to overcome the presumption against extraterritoriality.

"definititely disclose[s]" an intention to apply Section 1253(h) to aliens beyond our borders—and, in particular, to limit the authority of the President to order repatriation of aliens interdicted on the high seas.[21]

2. Paragraph (2) of Section 1253(h), which carves out exceptions to the prohibition in paragraph (1), confirms that Section 1253(h) applies only to aliens in the United States. Of particular relevance here, paragraph (2)(C) provides that withholding of deportation or return is not available to an "alien [who] has committed a serious nonpolitical crime outside the United States *prior to the arrival of the alien in the United States*" (emphasis added). This exception presupposes that the alien involved has arrived "in the United States." Two other exceptions likewise refer to the "United States," expressing a determination to protect the "community of the United

[21] After concluding that Section 1253(h) applies to Haitian interdictees who have never arrived at our borders, the court of appeals held that repatriation of such interdictees without screening violates that Section's prohibition against "deport[ing] or return[ing]" an alien to a country where he is threatened with persecution. The court recognized that the word "deport" applies only to an alien who is already in the United States, Pet. App. 20a, but it believed that "return" covers the present situation because it means "to bring, send, or put (a person or thing) back to or in a former position." Pet. App. 22a (quoting *Webster's Third New International Dictionary* 1941 (1976)). The court's definition of "return" adds nothing to its conclusion, because that definition is also fully consistent with our interpretation: the Attorney General may not "send" an alien *from* the United States "back" to Haiti if he would be threatened with persecution there.

The court of appeals also found it significant that although the word "return" in Section 1253(h) is followed by the phrase "to a country [where he would be threatened with persecution]," Congress "made no mention of where the alien (who may be anywhere, within or without the United States) must be returned 'from.'" Pet. App. 22a (brackets added by court). This reasoning, too, was seriously flawed. The phrase "to a country * * *" modifies "deport" as well as "return," and "deport" indisputably refers to removal of an alien *from* the United States. In any event, such negative inferences are insufficient to overcome the presumption against extraterritoriality. *Arabian American Oil*, 111 S. Ct. at 1231-1232, 1233-1234.

States" and "security of the United States" from the presence of undesirable aliens. See 8 U.S.C. 1253(h)(2)(B) and (D). There is, by contrast, no mention in paragraph (2) (or paragraph (1)) of aliens beyond our borders. Compare *Arabian American Oil*, 111 S. Ct. at 1234 (similarly noting Title VII's mention of "states" but not foreign nations). Thus, Section 1253(h)'s "only geographic reference[s]," *Defenders of Wildlife*, 112 S. Ct. at 2150 (Stevens, J., concurring in the judgment), confirm its domestic focus.

3. The interpretation of Section 1253(h) evident from its terms is also compelled by the statutory context in which it appears. Section 1253(h) is located in Part V of the INA, 8 U.S.C. 1251-1260, which prescribes standards and procedures for expelling aliens from the United States. Section 1251, entitled "Deportable aliens," identifies which aliens are subject to expulsion. It begins by stating that "[a]ny alien *in the United States* * * * shall, upon the order of the Attorney General, be deported," if he falls within any of a number of enumerated categories. 8 U.S.C. 1251(a) (emphasis added). Section 1252, entitled "Apprehension and deportation of aliens," then provides for arrest and detention of the alien; deportation proceedings before a special inquiry officer; a final order of deportation; and removal of the alien "from the United States" by the Attorney General. 8 U.S.C. 1252(a)-(c).

Section 1253, in turn, is entitled "Countries to which aliens shall be deported." Its inapplicability to aliens outside the United States is established by subsection (a), which states that "[t]he deportation of an alien *in the United States* * * * shall be directed by the Attorney General," either to a country designated by the alien that is willing to accept him or to another country. 8 U.S.C. 1253(a) (emphasis added); see *Doherty*, 112 S. Ct. at 722. Subsection (h) of 8 U.S.C. 1253, at issue here, simply places a limitation on the countries (specified in subsection (a)) to which the Attorney General may send an alien who is unlawfully "in the United States."

In sum, the text and structure of Part V of the INA as a whole (see *McCarthy* v. *Bronson*, 111 S. Ct. 1737, 1740 (1991)) refute the notion that Section 1253(h) confers a free-standing right upon aliens anywhere in the world. See also *HRC II*, Pet. App. 215a; *HRC* v. *Gracey*, 600 F. Supp. 1396, 1404 (D.D.C. 1985), aff'd on other grounds, 809 F.2d 794 (D.C. Cir. 1987).

B. The Limited Territorial Reach Of Section 1253(h) Is Confirmed By The Comparably Limited Reach Of Article 33 Of The United Nations Convention Relating to The Status Of Refugees, After Which Section 1253(h) Was Patterned

The limited territorial scope of Section 1253(h) is also supported by the parallel scope of Article 33 of the U.N. Convention Relating to the Status of Refugees. As this Court has noted, Section 1253(h) was revised by the Refugee Act of 1980, Pub. L. No. 99-912, § 203(e), 94 Stat. 107, to conform its language to Article 33. See *INS* v. *Stevic*, 467 U.S. 407, 421 (1984); *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 428-429, 436-437, 440 n.25 (1987); H.R. Rep. No. 608, 96th Cong., 1st Sess. 18 (1979); H.R. Conf. Rep. No. 781, 96th Cong., 2d Sess. 20 (1980).

In the preamble to his May 1992 Executive Order, the President, in accordance with the considered opinions of the Attorney General and the Secretary of State (Pet. App. 30a-31a; see J.A. 201-223), formally set forth his interpretation that the terms of Article 33 "do not extend to persons located outside the territory of the United States" (J.A. 376). This interpretation by the Executive is entitled to "great weight." *United States* v. *Stuart*, 489 U.S. 353, 369 (1989); *Sumitomo Shoji America, Inc.* v. *Avagliano* 457 U.S. 176, 184-185 (1982); *Kolovrat* v. *Oregon*, 366 U.S. 187, 194 (1961). It also respects the fundamental right of the respective Contracting States—inherent in their sovereignty and "[i]n accord with ancient principles of international law of nation states," *Kleindienst* v. *Mandel*, 408 U.S. at 753—to exclude aliens. See also *Nishimura Ekiu*, 142 U.S. at 659-660; L.

Oppenheim, *International Law* 675-676 (Lauterpacht 8th ed. 1955). Just as 8 U.S.C. 1253(h) should not be construed to dispense with that sovereign right on the part of the United States alone in the absence of the clearest expression of congressional intent (see page 28, *supra*), so too Article 33 of the U.N. Convention should not be construed to dispense with that sovereign right on the part of the Contracting States generally, in the absence of the clearest expression of agreement among them to do so. Cf. *Bowen* v. *Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41, 52-53 (1986) (contracts construed to avoid foreclosing exercise of sovereign authority).[22]

There is no evidence that the Contracting States agreed to extend Article 33 to the high seas and elsewhere throughout the world.[23] Indeed, the President's contrary interpretation is supported by: (1) the text of Article 33 and the Convention as a whole, (2) its negotiating history, (3) the United States' accession to the Convention, (4) Congress's understanding when it implemented Article 33 in 1980, and (5) subsequent international negotiations and

---

[22] In contrast to the U.N. Refugee Convention, agreements concerning refugee seamen obligate a contracting party to admit a refugee in certain circumstances. See Hague Agreement Relating to Refugee Seamen, Nov. 23, 1957, 506 U.N.T.S. 126; Hague Protocol Relating to Refugee Seamen, June 12, 1973, 965 U.N.T.S. 445. Those agreements, which cross-reference the U.N. Refugee Convention and Protocol, are concerned with seamen who are not entitled to admission to the territory of any State other than a State where they have a well-founded fear of persecution. See 2 D.P. O'Connell, *The International Law of the Sea* 790-791 (1984).

[23] Nations have demonstrated that they know how to place the high seas within the reach of a treaty when they desire to do so. Compare *Arabian American Oil*, 111 S. Ct. at 1235 (quoting *Argentine Republic*, 488 U.S. at 440). See, *e.g.*, Geneva Convention on the High Seas, Apr. 29, 1958, [1962] 13 U.S.T. 2312, T.I.A.S. No. 5200; U.N. Convention on the Law of the Sea, Dec. 10, 1982, 21 I.L.M. 1261. The U.N. Refugee Convention contains no comparable provisions that render Article 33 applicable to aliens encountered on the high seas.

the Department of State's construction of the Convention.[24]

1. a. Article 33 contains no express statement or other affirmative indication that it was intended to impose obligations on a Contracting State outside its own territory. Paragraph 1 of Article 33 provides that "[n]o Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of a territory where his life or freedom would be threatened" on account of his political opinion. The most natural reading of this language is that it expresses an essentially unitary prohibition against removal of a refugee *from* the "Contracting State" *to* a foreign territory in the specified circumstances, irrespective of the manner in which the removal might be accomplished. The prohibition against "expelling" plainly has in mind a refugee who is within the territory of the Contracting State. The succeeding phrase rounds out that prohibition by providing that a refugee is likewise not to be sent ("return[ed]") from the Contracting State to the foreign territory in any *other* "manner". This reading is consistent with the French word "refouler," which immediately follows (and defines) "return" in paragraph 1. Significantly, one meaning of "refouler"—a meaning specifically relevant to this case—is "expel

[24] Even if Article 33 did apply to aliens outside the United States, it would not afford them any privately enforceable rights. In its June 10 decision, the Second Circuit correctly recognized that the U.N. Protocol (including its incorporation of Article 33) is not judicially enforceable because the Protocol does not grant rights beyond those afforded by domestic law. See Pet. App. 110a n.13. This holding by the court below was consistent with its own prior rulings, see *Bertrand* v. *Sava*, 684 F.2d 204, 218-219 (1982); *Chim Ming* v. *Marks*, 505 F.2d 1170, 1172 (1974), aff'g 367 F. Supp. 673, 677-679 (S.D.N.Y. 1973), as well as those of every other court of appeals that has considered the question, including the Eleventh Circuit in *HRC II*. See Pet. App. 173a; *United States* v. *Aguilar*, 883 F.2d 662, 680 (9th Cir. 1989), cert. denied, 111 S. Ct. 751 (1991); *Pierre* v. *United States*, 547 F.2d 1281, 1289 (5th Cir.), vacated on other grounds, 434 U.S. 962 (1977); see also *Gracey*, 600 F. Supp. at 1401, 1406.

(aliens)." *Cassell's French Dictionary* 627 (1978). Under this meaning, "return ('refouler')," like "expel," connotes ejection of an alien from within the territory of the Contracting State.

The court of appeals rejected this interpretation because it believed that it would render the term "return ('refouler')" redundant by effectively revising Article 33.1 to forbid a Contracting State to "expel or expel" an alien. Pet. App. 29a. The court was wrong. Insertion of the French word "refouler" after "return" in the English text demonstrates that the latter is used as a term of art. Although its meaning is similar to that of "expel," the two terms are not identical. As the background and negotiating history of the Convention show (see pages 42-44, *infra*)—and as the court of appeals in fact acknowledged (Pet. App. 29a)—"expel" likewise is a term of art in this setting, referring to the formal process for removing an alien who was lawfully admitted to the country. See *ibid.* (discussing Article 32, which restricts the authority of Contracting States to "expel a refugee lawfully in their territory"). Refoulement, by contrast, connotes "summary reconduction" (mere physical relocation) of an individual. G. Goodwin-Gill, *The Refugee in International Law* 69 (1983). Thus, as the court of appeals itself pointed out, refoulement is "to be *distinguished* from expulsion or deportation, the more formal process whereby a lawfully resident alien may be required to leave a state, or be forcibly ejected therefrom." Pet. App. 29a (quoting G. Goodwin-Gill, *supra*, at 69) (emphasis added).

By the court's own reasoning, then, "expel" and "return ('refouler')" are *not* redundant under our interpretation of Article 33. Rather, they describe two different ways in which an alien might be physically removed from the Contracting State's territory, and they make clear that Article 33 (unlike, *e.g.*, Articles 26, 28, and 32) applies equally to individuals who have been lawfully admitted and those who are in the State's territory but not yet lawfully admitted. By the same token, as the court of appeals also

recognized (Pet. App. 29a), its interpretation of "return ('refouler')" to include repatriation of an alien from anywhere in the world would render superfluous the prohibition against "expel[ling]" an alien to a foreign country where he is threatened with persecution, because the latter action would in any event be barred by the all-encompassing prohibition against "return" of the alien to such a country.[25]

b. Our interpretation of paragraph 1 of Article 33 is confirmed by paragraph 2, which states that the benefit of Article 33 may not be claimed by a refugee who is a danger to the security of "the country in which he is." This paragraph, which is the only territorial reference in the

[25] The court of appeals also cited respondents' reliance on other meanings of the French word "refouler," such as "drive back" or "repulse." Pet. App. 28a; see Resp. C.A. Br. 17 (citing M. Dubois, *Dictionnaire Larousse* 631 (1981)). Unlike the definition on which we rely ("expel (aliens)"), however, those definitions do not specifically relate to the subject of this case. In any event, the existence of several French definitions is fatal to the court's conclusion (Pet. App. 26a, 29a) that the "plain language" of Article 33.1 compels the interpretation it adopted and forecloses consideration of the negotiating history. See *Eastern Airlines, Inc.* v. *Floyd*, 111 S. Ct. 1489, 1497-1499 (1991) (looking to negotiating history to ascertain meaning of French text).

Moreover, in quoting these alternative definitions below, respondents apparently intended to argue that the term "return ('refouler')" prohibits a contracting State from rejecting an alien who has arrived at its borders, while "expel" prohibits ejection of an alien from within its borders. There are at least three problems with this argument. First, it is inconsistent with respondents' primary argument (that the term "return" applies to the Contracting State wherever it may act), which would extend Article 33 far beyond rejection of those aliens who arrive at the State's own borders. Second, the negotiating history shows that the drafters specifically rejected respondents' alternative interpretation of "return," in order to ensure that Article 33.1 would *not* require a Contracting State to permit a mass influx of refugees across its borders. See pages 42-44, *infra*. Third, Article 33.1 would be inapplicable in this case even if "return ('refouler')" were interpreted to mean to "drive back" or "repulse" aliens from the Contracting State's borders, because the Haitian migrants interdicted off the coast of Haiti are not at the borders of the United States.

Article, contemplates that a refugee is covered only if he is "in" a "country" of refuge. Thus, read as a whole, Article 33 applies only to a refugee who is within the territory of a Contracting State. See, *e.g.*, *Air France* v. *Saks*, 470 U.S. 392, 397-400 (1985) (construing together the liability provisions of the Warsaw Convention).

c. The text and structure of the Convention as a whole lend further support to this interpretation. As the court of appeals acknowledged (Pet. App. 26a-27a), the premise that the Convention is limited to the territory of the Contracting State is woven throughout its provisions. See Arts. 4, 15, 17.1, 18, 19.1, 21, 23, 24, 26, 27, 28, 31.1, 32.1.[26] Moreover, Article 40.1 (entitled "Territorial Application Clause") provides that a State may, at the time of signature, ratification, or accession, "declare that this Convention shall *extend* to all or any of the territories for the international relations of which it is responsible" (emphasis added). Accordingly, Article 40.1 indicates that a Contracting State's obligations under Article 33 do not automatically extend beyond its metropolitan territory even to its territories or possessions, much less to the high seas and throughout the entire world, as the court of appeals held. See Pet. App. 67a (Walker, J., dissenting).[27]

d. The court of appeals erroneously relied on language in Article 1.3 of the Protocol stating that the Protocol "shall

[26] See also Art. 1.F.b (emphasis added) (excluding from the Convention's protections any person with respect to whom there are serious reasons for considering that "he has committed a serious non-political crime outside the country of refuge *prior to his admission to that country as a refugee*"). Compare 8 U.S.C. 1253(h)(2)(C), discussed at pages 34-35, *supra*.

[27] Paragraph 2 of Article 40 permits a Contracting State to extend the Convention to other territories after it ratifies or accedes to the Convention, subject, where necessary, to the consent of the governments of those other territories; and paragraph 3 encourages Contracting States to do so. Numerous declarations of territorial application have been filed with the Secretary General of the U.N. under Article 40. See U.N., *Multilateral Treaties Deposited With the Secretary General: Status as of December 30, 1990*, at 210-211 (1991).

be applied by the States Parties hereto without any geographic limitation." Pet. App. 28a (quoting 19 U.S.T. at 6225). As is evident from the remainder of the quoted sentence (which the court omitted), the "geographic limitation" to which Article 1.3 of the Protocol refers is the one contained in the definition of the term "refugee" in Article 1 of the 1951 Convention, which permitted a Contracting Party either to limit its obligations to refugees from Europe, or to extend them to refugees from elsewhere as well.[28] It is, by contrast, Article 7.4 of the Protocol (which carries forward some features of Article 40 of the Convention) that addresses the "territorial" scope of the Contracting State's obligations.[29]

2. Any lingering doubt on the extraterritoriality issue is dispelled by the official minutes of the Conference of Plenipotentiaries that adopted Article 33 in the form in which it was ratified. The Swiss delegate expressed the view at one session of the Conference that "expel" "related to a refugee who had already been admitted to the territory

[28] The Convention also limited the term "refugee" to persons who satisfied the definition as a result of events occurring before January 1, 1951. See Arts. 1.A, 1.B. Article 1.2 of the Protocol defines "refugee" to have the same meaning as under Article 1 of the Convention, but without the 1951 cut-off date. Article 1.3 of the Protocol then provides that the Protocol shall be applied by States parties "without any geographic limitation, save that existing declarations made by States already Parties to the Convention in accordance with article 1B(1)(a) of the Convention, shall, unless extended under article 1B(2) thereof, apply also under the present Protocol." As a result of Article 1.3 of the Protocol, nations that were parties to the 1951 Convention could, when they ratified the Protocol, maintain any limitations they had previously declared on the geographic area-of-origin of the refugees to whom they assumed obligations; but nations that adhere to the Convention only by becoming parties to the Protocol may not limit their obligations in that manner.

[29] Article 7.4 provides that declarations of territorial application made by a State pursuant to paragraphs 1 and 2 of Article 40 of the Convention shall be deemed to apply to the Protocol as well, and that paragraghs 2 and 3 of Article 40 "shall be deemed to apply *mutatis mutandis* to the present Protocol."

of a country," while "return" related to "refugees who had already entered a country but were not yet resident there." Conference of Plenipotentiaries, *Summary Record of the 16th Meeting*, U.N. Doc. A/CONF.2/SR.16, at 6 (July 11, 1951). The representatives of France, Belgium, Germany, Italy, the Netherlands, and Sweden agreed. *Id.* at 6, 11-12. At a subsequent session, the Dutch delegate reiterated the Swiss interpretation of "expulsion" and " 'return' ('*refoulement*')," and he stated that based on his intervening conversations with other representatives as well, there appeared to be a "general consensus" in favor of it. *Id., 35th Meeting*, U.N. Doc. A/CONF.2/SR.35, at 21 (July 25, 1951). The Dutch delegate then asked to have the record show that the Conference was in agreement with this interpretation, "[i]n order to dispel any possible ambiguity" and to ensure that "mass migrations across frontiers or * * * attempted mass migrations"—the precise context of this case—are "not covered by article 33." *Ibid.* "There being no objection," the President of the Conference ordered that interpretation "placed on record." *Ibid.* The President further suggested that "refouler" be placed in brackets after "return" every place the latter word appears in the English text, and that suggestion was "adopted unanimously." *Id.* at 21-22. See J.A. 224-230.

On this record, the word "refouler" in paragraph 1 of Article 33 can only be understood to embody a deliberate decision by the Contracting States (including the United States[30]) to incorporate the territorial limitation we urge into the text of the Convention. Pet. App. 63a-66a (Walker, J., dissenting); see also *Gracey*, 809 F.2d at 840 & nn.132, 133 (Edwards, J., concurring and dissenting).[31] Commen-

[30] The United States' delegate was present at the July 11 and 25 sessions. U.N. Doc. A/CONF.2/SR.16, at 2; U.N. Doc. A/CONF. 2/SR.35, at 2.

[31] The background of the Convention lends still further support to this conclusion, as explained in Nehemiah Robinson, *Convention Relating to the Status of Refugees: Its History, Contents and Interpretation* 160-163 (1953). As Robinson noted (at 162), an important study

tators, including the former United Nations High Commissioner for Refugees, have read Article 33 in the same manner. See Aga Khan, *Legal Problems Relating to Refugees and Displaced Persons*, 149 Recueil des Cours (Hague Academy of Int'l Law) 287, 318 (1976).[32]

---

published by the United Nations in 1949 as a prelude to the Convention had used the term "expulsion" to mean "the juridical decision taken by the judicial or administrative authorities whereby an individual is ordered to leave the territory of the country." U.N. Dep't of Social Affairs, *A Study of Statelessness* 60 (1949). By contrast, the *Study* had used the term "reconduction" (which it regarded as the equivalent of "refoulement") to mean "the mere physical act of ejecting from the national territory a person who has gained entry or is residing therein irregularly," and *not* "to signify the act of preventing a foreigner who has presented himself at the frontier from entering the national territory." *Id.* at 60 & n.1. Robinson, too, regarded "reconduction" to be "the equivalent of 'refoulement,'" and he noted that reconduction "was changed by the Ad Hoc Committee [on Statelessness, which prepared the first draft of the Convention,] to the word 'return.'" Robinson, *supra*, at 162; see *Report of the Ad Hoc Comm. on Statelessness and Related Problems*, U.N. Doc. E/AC.32/5, at 7 (Draft Convention Art. 28) (Feb. 17, 1950). This background reinforces our submission that Article 33.1 states what is essentially a unitary prohibition against a Contracting State's ejection of a refugee from its territory, whatever the means and whatever the legal status of the refugee. See pages 38-39, *supra*.

[32] See also Robinson, *supra*, at 160-163; 2 A. Grahl-Madsen, *The Status of Refugees in International Law* 94 (1972); Hailbronner, *Non-Refoulement and "Humanitarian" Refugees: Customary International Law or Wishful Legal Thinking?*, 26 Va. J. Int'l L. 857, 861-862 (1986); Chooi Fong, *Some Legal Aspects of the Search for Admission Into Other States*, 1981 Brit. Y.B. Int'l L. 53, 69; Weis, *The United Nations Declaration on Territorial Asylum*, 7 Can. Y.B. Int'l L. 92, 123-124 (1969); Pugash, *The Dilemma of the Sea Refugee: Rescue Without Refuge*, 18 Harv. Int'l L. J. 577, 591 (1977); Note, *The Right of Asylum Under United States Law*, 80 Colum. L. Rev. 1125, 1126-1127 (1980).

Even Goodwin-Gill, who advocates that the principle of non-refoulement be given a broader scope that would include non-rejection at the frontier, acknowledges that the negotiating history of the 1951 Convention is inconsistent with that view. See G. Goodwin-Gill, *supra*, at 74 ("At the 1951 Conference, no formal objection appears to have been raised to the Swiss interpretation of *non-refoulement*, limiting its application to those who have already entered state territory."); *ibid.* ("the fact remains that states were not prepared to include in the Convention any article on admission of refugees; *non-refoulement* in the sense of even a limited obligation to allow entry may well have been seen as coming too close to the unwished-for duty to grant asylum").

[33] As the Court explained in *Stevic* and *Cardoza-Fonseca*, although withholding of deportation under Section 1253(h) was then discretionary, INS could conform its decisions to Article 33 by

3. The inapplicability of Article 33 to the repatriations challenged here is also reflected in the United States' ratification of the U.N. Protocol, by which this Nation agreed to be bound by Article 33 of the 1951 Convention. The United States became a party to the Protocol on the understanding that our existing immigration laws already provided the protections that Article 33 required, and that Article 33 therefore could be implemented through Section 1253(h) as it then existed. *Stevic*, 467 U.S. at 417-418. That understanding, and the domestic focus of the Convention's provisions affording protections and rights to refugees, were reflected in the President's Letter of Transmittal to the Senate. The President stated that "most refugees *in this country* already enjoy the protection and rights which the Protocol seeks to secure for refugees *in all countries*," and that "[a]ccession to the Protocol would not impinge adversely upon established practices under existing laws *in the United States*." Exec. K, 90th Cong., 2d Sess. iii (1968) (emphasis added). The Secretary of State elaborated (*id.* at viii):

> [F]oremost among the rights which the Protocol would guarantee to refugees is the prohibition (under Article 33 of the Convention) against their expulsion or return to any country in which their life or freedom would be threatened. This article is comparable to Section 243(h) of the Immigration and Nationality Act, 8 U.S.C. 1254 [*sic*], and it can be implemented within the administrative discretion provided by existing regulations.[33]

The Foreign Relations Committee expressed a similar view in recommending approval of the Protocol.[34]

Significantly, when Article 33 was ratified on the basis of this understanding, Section 1253(h) expressly applied only to aliens "within the United States," 8 U.S.C. 1253(h) (1976); relying on that phrase, this Court had held that Section 1253(h) did not even apply to aliens who were physically present in the United States but subject to exclusion proceedings. See *Stevic*, 467 U.S. at 415 (citing *Leng May Ma* v. *Barber*, 357 U.S. 185, 187 (1958)); see also *INS* v. *Stanisic*, 395 U.S. 62, 71 (1969). *A fortiori*, Haitian migrants affected by the President's May 1992 Executive Order, who are altogether outside the United States, enjoy no rights under Article 33 as it was ratified. See *Gracey*, 809 F.2d at 841 (Edwards, J., concurring and dissenting).[35]

---

exercising its discretion in favor of withholding where the standards in Article 33 were met. See 467 U.S. at 429 n.22; 480 U.S. at 429.

[34] S. Exec. Rep. No. 14, 90th Cong., 2d Sess. 2 (1968) ("It is understood that the protocol would not impinge adversely upon the Federal and State laws of this country."); see also 114 Cong. Rec. 29,391 (1968) (Sen. Mansfield) (same); *id.* at 27,757 (Sen. Proxmire).

[35] The State Department witness who testified at the Senate hearing similarly described the Protocol as "a universal covenant designed to secure necessary protection *in asylum countries* for those fleeing from their homelands because of persecution, and also, importantly, those rights which are necessary to their re-establishment as self-supporting members of other societies." S. Exec. Rep. No. 14, *supra*, at 4; see also *ibid.* (emphasis added) ("refugees *in the United States* have long enjoyed the protection and the rights which the protocol calls for, on at least a basis equal to that which signatories to the protocol would undertake to implement for refugees *within their respective territories*"); *id.* at 6 (accession to the Protocol "does not in any sense commit the Contracting State to enlarge its immigration measures for refugees"); *id.* at 10 ("there is nothing in this protocol which implies or puts any pressure on any contracting state to accept additional refugees as immigrants"); *id.* at 16 (noting that the United Kingdom had not filed a declaration under the "territorial clause" of the Convention (Article 40) making it applicable to refugees from China who were in Hong Kong); *id.* at 19 (it is "absolutely clear" that "nothing

4. The territorial limitation on application of Article 33 was recognized not only at the time of the United States' accession to the Protocol, but also when Congress amended Section 1253(h) as part of the Refugee Act of 1980. As noted above, Section 1253(h) was amended primarily to conform its language to that of Article 33 of the Convention, and thus to carry it into effect in U.S. law. See page 36, *supra*. It therefore is significant that the legislative history of the 1980 Act shows that Congress understood the Convention to apply only to "refugees *within the territory of the contracting states*." H.R. Rep. No. 608, *supra*, at 17 (emphasis added).[36]

5. Subsequent events confirm that Article 33 applies only to aliens within the territory of the Contracting State.

a. This understanding is reflected first in international efforts, subsequent to the Protocol, to draft a convention on territorial asylum. Compare *Eastern Airlines*, 111 S. Ct. at 1499-1500. Those efforts were preceded by the U.N. General Assembly's adoption of a non-binding Declaration on Territorial Asylum. Article 3(1) of that Declaration provided that no person who is entitled to seek and enjoy asylum from persecution "shall be subjected to measures such as rejection at the frontier or, if he has already entered the territory in which he seeks asylum, expulsion or compulsory return to any State in which he may be subjected to persecution." G.A. Res. 2312, 22 U.N. GAOR Supp. (No. 16) at 31, U.N. Doc. A/6716 (1967). This text makes clear that the prohibition against expulsion and

---

in the protocol * * * requires the United States to admit new categories or numbers of aliens").

[36] The President's 1968 Letter of Transmittal and the Secretary of State's accompanying letter concerning the Protocol were made part of the record of the House Hearings on the Refugee Act. See *Refugee Act of 1979: Hearings on H.R. 2816 Before the Subcomm. on Immigration, Refugees, and International Law of the House Comm. on the Judiciary*, 96th Cong., 1st Sess. 349-353 (1979) [*1979 House Hearings*]; see also *id.* at 335-349, 353-356 (reproducing Convention and Protocol).

return, which was directly parallel to that in Article 33, was to apply only to aliens who had "already entered the territory" of the contracting State. It was well understood that the non-binding prohibition against rejection at the frontier went beyond Article 33 of the Convention. See Weis, 7 Can. Y.B. Int'l L. at 142; accord, Grahl-Madsen, *An International Convention on Territorial Asylum* 33 (2d ed. 1976).

In the mid-1970s, efforts were renewed to draft a convention on territorial asylum. Ultimately, a group of experts established by the General Assembly proposed a draft convention, Article 3 of which again rested on the same territorial premise. It stated: "No person entitled to the benefits of this Convention *who is in the territory of a contracting State* shall be subjected by such contracting State to measures such as *return or expulsion* which would compel him to return to a territory where his life or freedom would be threatened" (emphasis added). Article 3 further provided that a Contracting State shall use its "best endeavors" to ensure that no person will be rejected at its frontiers if there are well-founded reasons to believe that rejection would subject him to persecution. U.N. Group of Experts on the Draft Convention on Territorial Asylum, *Report and Consolidated Text of Articles*, at 16, 34, U.N. Doc. A/AC.174/MISC.3/GE.75-6119 (June 10, 1975) [*Experts' Report*]. Significantly, the initial proposal to reword this provision came from the United States, which took the position that "the principle of non-refoulement * * * should only apply to persons in the territory of a Contracting State." *Id.* at 14.[37]

b. The Secretary of State adopted the same position in the domestic context in a policy memorandum on asylum

[37] Compare Proposal by the Expert of the United States, U.N. Doc. A/AC.174/Informal Working Paper No. 4 (Apr. 29, 1975), in *Documents of the U.N. Group of Experts on the Draft Convention on Territorial Asylum* 80 (1976), with *Experts' Report*, *supra*, at 110-112, 132; see also 1975 *Digest of the United States Practice in International Law* at 156-158.

he transmitted to all federal agencies and published in the Federal Register in January 1972. See 37 Fed. Reg. 3447.[38] There, the Secretary explained that the United States' asylum policy was informed by the 1951 Convention, to which the United States had acceded by ratifying the U.N. Protocol, particularly "its explicit prohibition against the forcible return of refugees to conditions of persecution." *Ibid.* The Secretary explained that "[a]s a party to the Protocol, the United States has an international treaty obligation for its implementation *within areas subject to jurisdiction of the United States*." *Ibid.* (emphasis added). The State Department took the same position in testimony before Congress in 1980.[39] And in 1989, in the specific context of the Haitian interdiction program, the Department formally communicated to Congress its view, based on the text of Article 33, its negotiating history, and the practice of the international community, that Article 33 "extends only to persons who have gained entry into the territory of the Contracting State." *Haitian Detention and Interdiction: Hearing Before the Subcomm. on Immigration, Refugees, and International Law of the House Comm. on the Judiciary*, 101st Cong., 1st Sess. 36-43 (1989) (statement of Alan J. Kreczko, Deputy Legal Adviser, Dep't of State).[40]

[38] As the administering agency, the views of the State Department are entitled to deference. The reasons for according deference to agency interpretations of domestic statutes have even greater force when it comes to interpretation of treaties, given the importance of addressing foreign policy issues with a single voice. *Curtiss-Wright*, 299 U.S. at 319.

[39] See *The Situation in Liberia, Spring 1980—Update: Hearing Before the Subcomm. on Africa of the House Comm. on Foreign Affairs*, 96th Cong., 2d Sess. 10 (1980) (testimony of William T. Lake, Deputy Legal Adviser, Dep't of State) ("The obligation of a party to the Protocol * * * is not to return an applicant who presents his claim for asylum inside the territory of the United States.").

[40] The court of appeals relied on a 1981 opinion of the Office of Legal Counsel in which OLC concluded that the proposed interdiction of Haitian flag vessels would not violate the Convention and observed

c. Later in 1989, the United States reaffirmed this position to the international community at a meeting of the Executive Committee of the U.N. High Commissioner for Refugees. At that meeting, the U.S. representative stated that Article 33 "pertained only to persons already in the country and not to those who arrived at the frontier or who were travelling with the intention of entering the country but had not yet arrived at their destination." *Summary Record of the 442nd Meeting* at 16, U.N. Doc. A/AC.96/SR.442 (1989). No party to the Convention expressed disagreement. Similarly, notwithstanding the controversy surrounding the United States' policy concerning Haitian migrants, no State questioned the United States' position at the most recent annual meeting of the Executive Committee in October of this year.

---

that "[i]ndividuals who claim that they will be persecuted * * * must be given an opportunity to substantiate their claims." 5 Op. Off. Legal Counsel 242, 248 (1981) (J.A. 316-317); see Pet. App. 31a. The premise of this statement—that Article 33 applies to aliens outside the territory of the United States—was not accompanied by any analysis of the Convention's text and negotiating history or the formal pronouncements to the contrary by the State Department between 1972 and 1980. The failure of the OLC opinion to examine the premise that Article 33 applied on the high seas may perhaps have been due to the fact (which has just come to our attention) that the same premise was also assumed by some State Department personnel at the time—likewise without analysis and, apparently, without awareness of the negotiating history and the State Department's own prior pronouncements to the contrary. In any event, this unexamined premise within the government was short-lived. In 1985, the United States, in *HRC* v. *Gracey*, *supra*, formally restated its prior public position that Article 33 does *not* apply to aliens outside the United States, relying on the negotiating history of the Convention, subsequent international negotiations, and other materials that confirm that reading. Furthermore, in opinions dated December 11 and 12, 1991, respectively, the Department of State's Legal Adviser and the Assistant Attorney General for OLC examined the issue at length and concluded that Article 33 does not apply in this setting. Pet. App. 31a; J.A. 202-216, 217-223. The 1991 OLC opinion expressly reversed the conclusory statement in the 1981 OLC opinion relied upon by the court below. J.A. 222-223.

6. In sum, the President's interpretation of Article 33 as applying only to persons within the territory of the Contracting State finds compelling support in the text of Article 33, its negotiating history, its ratification by the United States in 1968, its implementation by Congress in 1980, and the official interpretation by the State Department. By the same token, there is no basis on this historical record for the court of appeals' unseemly attempts to dismiss as a mere "litigating posture" (Pet. App. 31a, 32a) the interpretation of Article 33 formally adopted by the President on behalf of the United States as party to the Protocol and as a member of the international community.

C. The 1980 Amendments To Section 1253(h) Do Not Give It Extraterritorial Reach

Despite the compelling support in the text of the INA and in Article 33 of the Convention for construing 8 U.S.C. 1253(h) in conformity with the presumption against extraterritoriality, the court of appeals held that the 1980 amendments to Section 1253(h) gave it a world-wide scope. The court noted that prior to 1980, Section 1253(h) provided that "[t]he Attorney General is authorized to withhold deportation of any alien within the United States" to a country in which the alien would be subject to persecution (see 8 U.S.C. 1253(h) (1976)), while the amended version provides that "[t]he Attorney General shall not deport or return any alien" to such a country. The court found it significant that the 1980 amendments bar "return" as well as deportation and omit the phrase "within the United States." See Pet. App. 15a, 19a, 20a. For at least three reasons, the court of appeals read far too much into those changes.

1. This Court has twice recognized that the 1980 revisions of Section 1253(h) were merely clarifying amendments designed to conform its language to that of Article 33. *Stevic*, 467 U.S. at 421; *Cardoza-Fonseca*, 480 U.S. at 436-437. The revisions on which the court of

appeals relied are consistent with that modest purpose, because Article 33 also contains the phrase "or return" (albeit with the parenthetical modifier "refouler"), but nothing parallel to "within the United States." There is no reason to believe that Congress intended those changes to have the further effect of rendering Section 1253(h) world-wide in scope, because Congress understood in 1980 that the Protocol (and therefore Article 33 of the Convention) applies to "refugees within the territory of the contracting states." H.R. Rep. No. 608, *supra*, at 17.

2. Prior to the 1980 amendments, this Court had held that the benefits of Section 1253(h) were confined to aliens in deportation proceedings, and were not available to "excludable" aliens who were apprehended at the border and paroled into the United States. *Leng May Ma*, 357 U.S. at 187; accord, *Stanisic*, 395 U.S. at 71. That holding rested on the Court's conclusion that such aliens were not among those "within the United States" in the "technical sense" in which that phrase was used in Section 1253(h). *Stanisic*, 395 U.S. at 71; see *Leng May Ma*, 357 U.S. at 190.[41]

Against this background, if Congress wanted to extend the benefits of Section 1253(h) to aliens in exclusion proceedings, the most logical way to accomplish that result was to delete the phrase ("within the United States") upon which this Court had relied in holding that such aliens were not covered by that Section. As Judge Walker pointed out, the legislative history of the 1980 amendments indicates that the revisions on which the court below relied were intended to do precisely that. See Pet. App. 58a (quoting H.R. Rep. No. 608, *supra*, at 30)

[41] Accord, *In re Pierre*, 14 I. & N. Dec. 467, 470 (1973), aff'd, 547 F.2d 1281 (5th Cir. 1977); *In re Cenatice*, 16 I. & N. Dec. 162, 164 (1977); see also *Plyler* v. *Doe*, 457 U.S. 202, 212-213 n.12 (1982) (noting *Leng May Ma*'s holding that an alien paroled into the United States was not "within the United States" for purposes of Section 1253(h), which reflected the "longstanding distinction" between exclusion and deportation proceedings).

(emphasis omitted) (changes "require * * * the Attorney General to withhold deportation of aliens who qualify as refugees and who are in exclusion as well as deportation proceedings"); accord, S. Rep. No. 256, 96th Cong., 1st Sess. 17 (1979).[42] And as Judge Walker also pointed out, Pet. App. 59a, the addition of "return" serves to clarify that intent, because "deport," as used in Part V of the INA, does not as a "technical" matter encompass the removal of excludable aliens, *Leng May Ma*, 357 U.S. at 187, while "return" does. Thus, at most, the amendments to 8 U.S.C. 1253(h) extended its coverage to aliens in exclusion proceedings. *Gracey*, 809 F.2d at 840-841 (Edwards, J., concurring and dissenting)[43]; Note, 80 Colum.

[42] The same understanding was expressed by witnesses for Amnesty International, U.S.A., during the 1979 hearings on a version of the bill that contained the changes (addition of "return" and deletion of "within the United States") on which the court of appeals relied. See *1979 House Hearings* 14-15 (section of bill amending 8 U.S.C. 1253(h)). Although the witnesses urged the committee to revise the provision further to make withholding mandatory, they stated that "Amnesty does welcome the most proposed change in section 243(h) which would remove the artificial distinction presently advanced by the Immigration and Naturalization Service between deportation and exclusion [illegible] at 169. During hearings in 1977 on a predecessor bill containing similar revisions, the Commissioner of INS likewise described their purpose to be "to make withholding of deportation [illegible] persecution available in exclusion, as well as expulsion [illegible]." See *Admission of Refugees into the United States: Hearings on H.R. 3056 Before the Subcomm. on Immigration, Citizenship and International Law of the House Comm. on the Judiciary*, 95th Cong., 1st Sess. 81 (1977); *id.* at 12 (relevant section of bill); see also 33, 84, 94.

[43] Judge Edwards noted that Section 1253(h) is broader than Article 33 of the Convention insofar as it applies to exclusion proceedings. 809 F.2d at 841. Judge Edwards pointed out (*ibid.*, note 136), in June 1980, INS issued regulations to implement the Refugee Act of 1980. Those regulations provided that after institution of exclusion or deportation proceedings against an alien, requests for asylum under 8 U.S.C. 1158 must be filed with the immigration judge, and such requests "shall also be considered as requests for withholding exclusion or deportation pursuant to section 243(h) of the Act [8 U.S.C. 1253(h)]."

L. Rev. at 1131. By contrast, there is not the slightest suggestion in the legislative history of the 1980 amendments that Section 1253(h) was also to apply to aliens beyond our borders. Surely, some mention would have been made if Congress had intended such a dramatic departure.[44]

3. Finally, nothing in the text of Section 1253(h), even as amended, states that it applies outside the United States. At most, paragraph (1) is silent on the question. Under *Arabian American Oil* mere silence forecloses extra-territorial application, for only "specific language" to that effect will suffice. See 111 S. Ct. at 1231-1232.

What is more, the amended text of Section 1253(h), like the prior text, affirmatively demonstrates a domestic focus. As Judge Walker pointed out, "Congress' decision in the 1980 amendments to continue to address the provision to the 'Attorney General' * * * indicates that [Section 1253(h)(1)] as amended was to be applied to * * *

---

45 Fed. Reg. 37,394 (1980) (adding 8 C.F.R. 208.3(b) (1981)). Current regulations likewise provide for withholding relief in exclusion as well as deportation proceedings. See 8 C.F.R. 236.3; see also *In re Rodriguez-Palma*, 17 I. & N. Dec. 465, 467 n.2 (1980) (because amended Section 1253(h) does not contain the phrase "within the United States," relief "is now available in both exclusion and deportation proceedings").

[44] The Conference Report, for example, refers to the amendments merely as providing for "withholding deportation," without even mentioning the word "return." See H.R. Conf. Rep. No. 781, *supra*, at 20. Similarly, although the section-by-section analysis of the bill in the House Report notes the extension of the provision to exclusion as well as deportation proceedings, the more general discussion of the bill refers only to "deportation." Compare H.R. Rep. No. 608, *supra*, at 20, with *id.* at 30. These shorthand descriptions reinforce the conclusion that Section 1253(h) was intended to apply only to aliens who are physically present in the United States. That was the interpretation given to Section 1253(h) in a 1980 report prepared by the Congressional Research Service at the request of Chairman Kennedy of the Senate Judiciary Committee soon after the 1980 amendments. See *Review of U.S. Refugee Resettlement Programs and Policies* 15 (Comm. Print 1980) (Section 1253(h) "is applicable only to aliens who are in the United States").

aliens over which the Attorney General had operational jurisdiction, and not to other refugees or potential refugees outside United States territory who might be encountered by other United States government personnel, be they Coast Guard, military, or the like." Pet. App. 59a-60a. Furthermore, although the 1980 amendments deleted the phrase "within the United States" from what is now paragraph (1) of Section 1253(h), they *added* no less than *four* references to the "United States" in the new paragraph (2) of Section 1253(h), which contains the various exceptions to the withholding requirement in paragraph (1). Exception (C) in paragraph (2) demonstrates that Section 1253(h) presupposes the alien's "arrival * * * in the United States," and exceptions (B) and (D) manifest a concern for the "community of the United States" and "security of the United States," respectively.

In short, the inference the court of appeals drew from the deletion of "within the United States" from paragraph (1) is more than offset by the addition of paragraph (2), and by the background and text of the amendments as a whole. The court of appeals' interpretation is also entirely implausible, for it ascribes to Congress the intent (without saying so) to use a two-word phrase buried in the body of Section 1253(h)—"or return"—to confer a free-standing right of non-repatriation on aliens throughout the world.

IV. EQUITABLE PRINCIPLES PRECLUDE THIS SUIT AND THE RELIEF RESPONDENTS SEEK

We have explained in Point I, *supra*, that respondents' judicial assault on the conduct of the interdiction program is precluded by the INA, which furnishes a right of judicial review only to aliens within the United States. But even if review is not statutorily foreclosed, the APA does not excuse courts from their duty "to dismiss any action or deny relief on any other appropriate legal or equitable ground." 5 U.S.C. 702(1). That provision was enacted in 1976, in response to recommendations by the Administrative Conference (H.R. Rep. No. 1656, 94th Cong., 2d Sess. 4

(1976); S. Rep. No. 996, 94th Cong., 2d Sess. 3 (1976)), to ensure that the APA's waiver of sovereign immunity does not allow courts to "decide issues about foreign affairs, military policy, and other subjects inappropriate for judicial action." See *Sovereign Immunity: Hearing Before the Subcomm. on Admin. Practice and Procedure of the Senate Comm. on the Judiciary*, 91st Cong., 2d Sess. 135 (1970) (report of Administrative Conference Committee on Judicial Review). The court of appeals' refusal to dismiss this suit in equity, and its decision instead to order injunctive relief, transgress this fundamental limitation.[45]

Since the President issued the new Executive Order on May 24, 1992, the Haitian migrant crisis has largely dissipated. The injunctive relief ordered by the court of appeals, if allowed to stand, will recharge that crisis, with all of its attendant problems: loss of life; interference with the conduct of foreign policy, the operation of military vessels on the high seas, and the use of a U.S. military base on hostile foreign soil in Cuba; and diversion of the limited resources of the State Department, Navy, Coast Guard, and INS from the tasks to which they have been assigned by the President and Congress. It will also impede the flexibility the President requires to address the migrant problem within the broader context of the sensitive and fluid situation affecting Haiti generally, which is the subject of ongoing diplomatic and economic measures. And it will undermine the ability of this Nation to speak with one voice, through the President, regarding the scope of the United States' obligations under Article

[45] The question is not simply whether an injunction should have issued once the court of appeals construed 8 U.S.C. 1253(h) (and Article 33 of the U.N. Convention) to apply in this setting. The courts below should have held as a threshold matter that this is not an appropriate case for injunctive or other equitable relief and dismissed this suit, without even reaching the issue of the application of 8 U.S.C. 1253(h) and Article 33. See *American Foreign Service Ass'n* v. *Garfinkel*, 490 U.S. 153, 161 (1989); see also *Webster* v. *Doe*, 486 U.S. at 604-605.

33 of the Convention, which the court of appeals, in the course of its opinion, has unilaterally extended to the high seas and throughout the world. Especially in the absence of an Act of Congress that purports to extend the equitable powers of federal courts into this sensitive area with far greater specificity than do the general judicial review provisions of the APA, "[t]he separation of powers problems present here make this virtually a textbook case for refusing such discretionary relief." *Ramirez de Arellano* v. *Weinberger*, 745 F.2d 1500, 1561 (D.C. Cir. 1984) (en banc) (Scalia, J., dissenting), vacated on other grounds, 471 U.S. 1113 (1985); see also *Sanchez-Espinoza* v. *Reagan*, 770 F.2d 202, 208 (D.C. Cir. 1985).[46]

[46] Injunctive relief restraining the operation of U.S. military vessels on the high seas is all the more inappropriate because it was sought by and granted to aliens who not only are outside the United States, but are nationals and residents of the foreign nation that is the very subject of the President's actions. The President, to whom the Constitution and Acts of Congress assign primary responsibility in this area, has assessed the overall situation and determined that the interests of the Haitian nationals concerned and other interests at stake are properly served by the policy he instituted on May 24, 1992: direct repatriation to Haiti, albeit with (i) an exception for interdictees who are threatened with immediate and grave physical danger (see note 5, *supra*), and (ii) provisions for the orderly processing of requests by Haitian nationals for admission to the United States as refugees under 8 U.S.C. 1157, which Congress enacted in 1980 specifically to govern the admission of refugees from outside the United States. It is not the role of a U.S. court to second-guess the adequacy of this admissions mechanism fashioned by Congress and the President, or to "balance" the interests of aliens abroad in circumventing that mechanism against other interests the court might deem relevant.

More than 15,000 Haitian nationals have availed themselves of the opportunity to file an application under 8 U.S.C. 1157 at the U.S. Embassy in Haiti. Although many residents of Haiti might choose to set out for the United States without prior approval under that Section, nothing in the INA grants them a right to do so. And nothing in the record supports the notion that there is a threat of persecution to members of the respondent class of such pervasiveness and magnitude that it would render relief under Section 1157 meaningless or justify the sweeping injunctive relief ordered by the court of appeals (see also

CONCLUSION

The judgment of the court of appeals should be reversed, and the case remanded to the district court with directions to dismiss the relevant portions of the complaint.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

STUART M. GERSON
Assistant Attorney General

MAUREEN E. MAHONEY
Deputy Solicitor General

PAUL T. CAPPUCCIO
Associate Deputy Attorney General

EDWIN S. KNEEDLER
Assistant to the Solicitor General

MICHAEL JAY SINGER
MALCOLM L. STEWART
Attorneys

EDWIN D. WILIAMSON
Legal Adviser

ALAN J. KRECZKO
Deputy Legal Adviser

MICHELLE KLEIN SOLOMON
Attorney

NOVEMBER 1992

Reply Br. Pet. Stage 6-7 n.4)—even if we assume, arguendo, that the courts below could properly weigh the competing equities in this setting.